



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>









117  
C  
Jul-26  
*OFFICIAL EDITION*

---

**REPORTS OF CASES**

**HEARD AND DETERMINED IN THE**

**APPELLATE DIVISION**

**OF THE**

**S U P R E M E C O U R T**

**OF THE**

**STATE OF NEW YORK.**

---

**JEROME B. FISHER, REPORTER.**

---

**VOLUME CXI.**

**1906.**

---

**J. B. LYON COMPANY,  
ALBANY, N. Y.**

---

Entered, according to Act of Congress, in the year nineteen hundred and six,  
By JOHN F. O'BRIEN, SECRETARY OF THE STATE OF NEW YORK,  
In trust for the benefit of the People of the said State, in the office of the Librarian of Congress,  
at Washington, D. C.

---

*Rec. Dec. 1, 1906*

---

J. B. LYON COMPANY,  
PRINTERS, ELECTROTYPERS AND BINDERS,  
LYON BLOCK, ALBANY, N. Y.

---

# Justices

OF

THE APPELLATE DIVISION OF THE SUPREME COURT.

---

## *First Department.*

- HON. MORGAN J. O'BRIEN, P. J.  
" EDWARD PATTERSON.  
" GEORGE L. INGRAHAM.  
" CHESTER B. McLAUGHLIN.  
" FRANK C. LAUGHLIN.  
" JAMES W. HOUGHTON,  
" JOHN PROCTOR CLARKE.

## *Second Department.*

- HON. MICHAEL H. HIRSCHBERG, P. J.  
" JOHN WOODWARD.  
" ALMET F. JENKS.  
" WARREN B. HOOKER.  
" WILLIAM J. GAYNOR.  
" ADELBERT P. RICH.\*  
" NATHAN L. MILLER.\*

## *Third Department.*

- HON. CHARLES E. PARKER, P. J.  
" WALTER LLOYD SMITH.  
" EMORY A. CHASE.  
" ALDEN CHESTER.  
" JOHN M. KELLOGG.  
" AARON V. S. COCHRANE.†

## *Fourth Department.*

- HON. PETER B. McLENNAN, P. J.  
" ALFRED SPRING.  
" PARDON C. WILLIAMS.  
" FRANK H. HISCOCK.  
" EDWIN A. NASH.  
" FREDERICK W. KRUSE.†

---

\*Designated by the Governor to sit temporarily.

†Designated by the Governor in the place of Hon. EMORY A. CHASE, who has been designated to sit in the Court of Appeals.

‡Designated by the Governor in the place of Hon. FRANK H. HISCOCK, who has been designated to sit in the Court of Appeals.

Every tenth volume of Hun's Reports from vol. 20 to vol. 90, and every tenth volume of Appellate Division Reports from vol. 10 to vol. 70 contains a Table of the Causes, published in Hun's Reports, which have been passed upon by the Court of Appeals.

Volume 100 App. Div. contains a table collecting all the causes published in the Appellate Division Reports passed upon prior to the issue of that volume.

The table published in vol. 110, together with the table in vol. 108, contains causes passed upon from the issue of vol. 100 to April 17, 1906.

JEROME B. FISHER,  
*Reporter.*

*CAUSES in which the decisions contained in the Appellate Division Reports have been passed upon by the Court of Appeals.*

ACME ROAD MACHINERY CO. v. TOWN OF BRIDGEWATER.....	104 App. Div. 597
<i>Judgment reversed and complaint dismissed : 185 N. Y. 1.</i>	
BLUM v. WHITNEY .....	111 App. Div. 922
<i>Order and judgment affirmed : 185 N. Y. 282.</i>	
BRIDGES v. NATIONAL BANK OF TROY.....	106 App. Div. 616
<i>Judgment affirmed : 185 N. Y. 146.</i>	
BROWN v. OTIS...f.....	98 App. Div. 554
<i>Order modified : 185 N. Y. 303.</i>	
CENTRAL TRUST CO. v. EGLESTON... ..	110 App. Div. 893
<i>Judgment affirmed : 185 N. Y. 23.</i>	
CITY OF ROCHESTER v. BLOSS.....	100 App. Div. 511
<i>Judgment of Appellate Division reversed and that of Special Term affirmed : 185 N. Y. 42.</i>	
COMMERCIAL NATIONAL BANK v. ZIMMERMAN.....	105 App. Div. 627
<i>Judgment affirmed : 185 N. Y. 210.</i>	
HALE v. WORSTELL.. ..	107 App. Div. 624
<i>Judgment affirmed : 185 N. Y. 247.</i>	
HINDLEY v. MANHATTAN RY. CO.....	103 App. Div. 504
<i>Judgment reversed and new trial ordered : 185 N. Y. 335.</i>	
KNICKERBOCKER TRUST CO. v. ISELIN.....	109 App. Div. 688
<i>Order reversed and demurrer sustained : 185 N. Y. 54.</i>	
LANGLEY v. ROUSS.....	106 App. Div. 225
<i>Judgment reversed and new trial granted : 185 N. Y. 201.</i>	
LEGGETT v. STEVENS .....	100 App. Div. 512
<i>Judgment modified and as modified affirmed : 185 N. Y. 70.</i>	
LILIENTHAL v. BÉTZ.....	108 App. Div. 222
<i>Order reversed and judgment ordered for plaintiff on demurrer : 185 N. Y. 153.</i>	
MANN v. SPROUT.....	102 App. Div. 60
<i>Order, so far as appealed from, reversed, and that part of the motion which asked leave to withdraw sum tendered and paid into court denied : 185 N. Y. 109.</i>	
MATTER OF BROOKLYN, Q. C. & S. R. R. Co....	106 App. Div. 240
<i>Order affirmed : 185 N. Y. 171.</i>	
MATTER OF DEPUE.. ..	108 App. Div. 58
<i>Order reversed and order of county judge affirmed : 185 N. Y. 60.</i>	
MATTER OF DILL v. WHEELER.....	100 App. Div. 155
<i>Order affirmed : 185 N. Y. 106.</i>	
MATTER OF LOCUST AVENUE. ....	110 App. Div. 774
<i>Order of Appellate Division reversed and order of County Court affirmed : 185 N. Y. 115.</i>	
MATTER OF MOUNT.....	107 App. Div. 1
<i>Judgment affirmed : 185 N. Y. 162.</i>	

▼

# vi CAUSES PASSED UPON BY COURT OF APPEALS.

MATTER OF STICKNEY .....	110 App. Div. 294
<i>Order affirmed: 185 N. Y. 107.</i>	
MCCOY v. N. Y. C. & H. R. R. Co.....	100 App. Div. 513
<i>Order and judgment of Appellate Division reversed and new trial ordered: 185 N. Y. 276.</i>	
MONJO v. WOODHOUSE.....	111 App. Div. 80
<i>Judgment affirmed: 185 N. Y. 295.</i>	
NEAGLE v. SYRACUSE, B. & N. Y. R. R. Co.....	109 App. Div. 339
<i>Judgment reversed and new trial granted: 185 N. Y. 270.</i>	
PEOPLE EX REL. CHAMPLIN v. GRAY .....	109 App. Div. 116
<i>Order reversed and determination of assessors confirmed: 185 N. Y. 196.</i>	
PEOPLE v. MARCUS.....	110 App. Div. 255
<i>Order affirmed: 185 N. Y. 257.</i>	
PEOPLE EX REL. BENDER v. MILLIKEN .....	110 App. Div. 579
<i>Order affirmed: 185 N. Y. 35.</i>	
PEOPLE EX REL. EISMAN v. RONNER.....	110 App. Div. 816
<i>Order affirmed: 185 N. Y. 285.</i>	
PEOPLE EX REL. SCHAU v. WHITTET.....	100 App. Div. 176
<i>Order of Appellate Division reversed and writ quashed: 185 N. Y. 92.</i>	
PRESTON v. ROCKEY.....	110 App. Div. 920
<i>Judgment affirmed: 185 N. Y. 186.</i>	
REIDY v. CITY OF NEW YORK.....	103 App. Div. 361
<i>Order and judgment reversed and judgment directed for plaintiff on submitted case: 185 N. Y. 141.</i>	
ROBERGE v. BONNER.....	94 App. Div. 842
<i>Judgment affirmed: 185 N. Y. 265.</i>	
ROCHE v. NASON.....	105 App. Div. 256
<i>Judgment affirmed: 185 N. Y. 128.</i>	
RYER v. PRUDENTIAL INS. Co.....	110 App. Div. 897
<i>Judgment reversed and complaint dismissed: 185 N. Y. 6.</i>	
SKILTON v. CODINGTON.....	105 App. Div. 617
<i>Judgment reversed and complaint dismissed: 185 N. Y. 80.</i>	
TAUTPHOEUS v. HARBOR & SUBURBAN BUILDING & SAVINGS ASSN.....	104 App. Div. 451
<i>Order and judgment of Appellate Division reversed; judgment of Special Term affirmed: 185 N. Y. 308.</i>	
WILCOX v. MCCLELLAN.....	110 App. Div. 378
<i>Judgment affirmed: 185 N. Y. 9.</i>	

The attention of the profession is called to the fact that the Court of Appeals in many cases decides an appeal upon other grounds than those stated in the opinion of the court below.

The affirmance or reversal of the judgment of the Appellate Division does not necessarily show that the Court of Appeals concurred in, or dissented from, the statements contained in the opinion of the Supreme Court. (*Rogers v. Decker*, 131 N. Y. 490.)—REP.



# A TABLE

## OF THE

### NAMES OF THE CASES REPORTED

#### IN THIS VOLUME

A.	PAGE.	B.	PAGE.
Abel v. Bischoff.....	925	Babcock v. Leonard.....	294
Acritelli, Tishman v.....	237	Bailey, Matter of.....	909
Adair, Town of Walton v.....	817	Baird v. Erie R. R. Co.....	909
Adams, Town of, Rice v....	910	Baker, Burke v.....	422
Ahearn, People ex rel. Michales v.	741	Baker, Matter of (In re Ricketts)...	669
Allen v. Pierson.....	908	Baker v. Metropolitan Life Insur-	
Allison Realty Co., McGuinness v..	926	ance Co .....	500
Altkrug v. Horowitz. ....	420	Baker, People ex rel. Brown v....	926
Altonwood Park Co. of New York,		Baldwin, People ex rel., v. McAdoo.	916
Gwynne v.....	920	Ball v. Ball.....	918
Alvord, Cullin v.....	911	Bank of Port Jefferson v. Darling.	920
Amalgamated Copper Co., People		Bankers' Surety Co. v. Rothschild.	130
ex rel. Fennelly v. ....	914	Bannister v. Michigan Mutual Life	
American Bridge Co. of New York,		Insurance Co. ....	765
Donohue v. ....	908	Barkas, Nowak v.....	921
Andrews v. Reiners.....	435, 916	Barkley, Hoffman House v. (No. 2).	564
Anglo-Continental Chemical Works		Barnett v. Sparrow Theatrical &	
(Ltd.) v. Dillon.....	418	Amusement Co. (Ltd.).....	919
Appleby v. Dalrymple.....	910	Barrett Chemical Company v.	
Archer, People ex rel., v. McAdoo.	919	Stern.....	913
Arkin v. Interborough Rapid Tran-		Barron, Russell v.....	382
sit Co.....	924	Barson v. Mulligan.....	913
Arlington Co. v. Insurance Com-		Barth, Guth v. ....	919
pany of New York.....	914	Basso v. Press Publishing Co.....	915
Arlington Co. v. Insurance Com-		Bean v. New York Edison Co.....	914
panies (14).....	914	Beardsworth v. Whitehead.....	923
Arnot v. Union Salt Co.....	911, 912	Beecroft v. New York Athletic	
Ashforth, Kelly v.....	922	Club .....	392
Ashheim, Matter of.....	176	Belotti v. Metropolitan Street R. Co.	925
Attucks Music Publishing Co.,		Bengston v. Swanston.....	919
Edmonds v.....	924	Bentley, Worden v.....	910
Auburn Telephone Co., Osborne		Berkowitz v. Chicago, Milwaukee	
v.....	702	& St. Paul R. Co.....	918
Avery, Buffum v.....	914	Berry v. French.....	910



# TABLE OF CASES REPORTED.

ix

	PAGE.		PAGE.
Cayuga Lake Cement Co., Hall v. . .	801	City of Watertown, Water Comrs.	
Central Nat. Realty & Construction		of, Remington & Son Pulp &	
Co., Lindheim & Co. v. . . . .	275	Paper Co. v. . . . .	907
Central Railroad Co. of New Jersey,		Clark, Cooper v. . . . .	915
Hanlon v. . . . .	918	Clark v. Scovill. . . . .	35
Central Vermont R. Co., Rosenfeld		Clark v. Trost . . . . .	916
v. . . . .	371	Clarke, Vines v. . . . .	12
Century Mercantile Co. v. Heeran		Clifford v. Denver & Rio Grande	
(No. 1). . . . .	910	R. R. Co. . . . .	518
Chadeayne v. City of Buffalo . . . .	909	Clifford v. New York Central & H.	
Chadsey, Matter of (In re Brooklyn		R. R. Co. . . . .	809
Bar Association) . . . . .	918	Coddington, McCormack v. . . . .	914
Chapin, Sterling v. . . . .	912	Coe, Matter of Weeks v. . . . .	337
Chicago, Milwaukee & St. Paul R.		Cohn v. Hessel. . . . .	914
Co., Berkowitz v. . . . .	918	Colcord, Matter of. . . . .	916
Chichester v. Winton Motor Car-		Coleman v. Interurban St. R. Co..	915
riage Co. . . . .	918	Coles v. Graburn. . . . .	917, 918
Cholet v. City of Syracuse. . . . .	903	College Heights Land Co., Niagara	
Christianna, People v. . . . .	917	County Irrigation & Water Sup-	
City of Buffalo, Chadeayne v. . . . .	909	ply Co. v. . . . .	770
City of Buffalo, Matter of Grade		Collins, People ex rel., v. Brower..	915
Crossing Comrs. (In re Schneider). .	909	Collyer, Matter of. . . . .	917
City of Elmira v. Seymour. . . . .	199	Commissioner of Public Works of	
City of New Rochelle, Nichols v. . .	921	City of New York. Matter of. . . .	285
City of New York, Board of Edu-		Commonwealth Trust Co., Gause v.	530
cation of, McLoughlin v. . . . .	921	Compton v. Compton. . . . .	923
City of New York, Board of Rapid		Concourse Park Hotel Co., New	
Transit Railroad Commissioners		York Mortgage & Security Co. v.	919
for, Matter of . . . . .	919	Conger, Knickerbocker v. . . . .	914
City of New York, Crowley v. . . . .	917	Conlen v. Riser. . . . .	925
City of New York, Ebbets v. . . . .	364	Connelly v. Harris. . . . .	920
City of New York, Follett v. . . . .	917	Conner, Matter of. . . . .	920
City of New York, Gage v. . . . .	914	Conway v. Cooney . . . . .	804
City of New York, Grant v. . . . .	160	Cook v. Griswold . . . . .	910
City of New York, Hildreth v. . . . .	63	Cook, People ex rel., v. Pitts . . . .	321
City of New York, Hodes v. . . . .	920	Cooke, Shaw v. . . . .	202
City of New York, Hosch Co. v. . . .	917	Cooney, Conway v. . . . .	864
City of New York, Johnson v. . . . .	918	Cooper v. Clark. . . . .	915
City of New York, Parks v. . . . .	836	Cooper v. Payne . . . . .	785
City of New York, Pymm v. . . . .	330	Copstein v. Union Railway Co. . . .	913
City of New York, Standard Pub-		Cordtmeyer, Niemann v. . . . .	326
lishing Co. v. . . . .	260	Corn, Goldman v. . . . .	674
City of New York, Stevens v. . . . .	362	Corn Exchange Bank v. Peabody..	553
City of New York, Triest v. . . . .	921	Cornwell v. East Rockaway Fire	
City of New York, Wahrman v. . . . .	345	Department . . . . .	920
City of Rochester, Matter of (In re		Cowles, Matter of. . . . .	924
Davis). . . . .	909	Coy, Hunt & Co., Michigan Savings	
City of Syracuse, Cholet v. . . . .	903	Bank v. . . . .	914
City Trust, Safe Deposit & Surety		Crumsey v. Sterling. . . . .	568
Co., Hellman v. . . . .	879	Crowley v. City of New York. . . .	917

## TABLE OF CASES REPORTED.

	PAGE.		PAGE.
Cullin v. Alvord.....	911	Driscoll v. New York & Queens County R. Co.....	920
Cullinan, People ex rel. Flinn v....	32	Duffy, Blansett v. ....	908
Culver, Swarthout v. ....	908	Duffy, Lenorak v. ....	921
Cummins, Sackett & Wilhelms Lithographing & Printing Co. v..	300	Dwight v. Lawrence.....	616
Cunard Steamship Co. (Ltd.), Lan- din v. ....	911	Dwyer, Matter of, v. Gearin.....	911
Cunningham v. Shea.....	624	Dwyer, People ex rel., v. Greene..	926
Curtice, Matter of .....	230	Dyhr v. Bush Co., Ltd.....	917
Curtin v. Curtin.....	447	Dykeman, Burlingame v.....	908
<b>D.</b>		<b>E.</b>	
Daley v. Ratigan.....	911	East Rockaway Fire Department, Cornwell v.....	920
Dalrymple, Appleby v.....	910	Eastman Kodak Co. v. Lewis....	924
Daly v. Kister. ....	920	Ebbets v. City of New York ....	364
Daly v. Reineldt. ....	917	Edison Electric Illuminating Co., Bly v....	170
Darling, Bank of Port Jefferson v.	920	Edison v. Interurban Street R. Co.	915
Davidson, Fox v.....	174	Edmunds v. Attucks Music Pub- lishing Co.....	924
Davis v. Martin....	411	Egbert, Hand v.....	920
Davis, Matter of (In re City of Rochester).....	909	Eggleston, Hicks v.....	918
Davis Manufacturing Co., Kells v..	911	Ehrenberg, Levis & Co. v.....	909
de Brulatour, Robertson v. ....	882	Ehrich v. Grant.....	196
De Lackner, Lordville & Equinunk Bridge Co. v.....	911	Eldridge, Town of North Hemp- stead v.....	789
Decker v. Hunt... ..	821	Elk Drug Co., Rourke v....	912
Deegan v. Syracuse Lighting Co..	908	Elmira, City of, v. Seymour.....	199
Deering v. Schreyer.....	914	Elmira Water, Light & Railroad Co., Gregory v.....	911
Delancy & Rivington Street School Site, Matter of.....	914	Elton v. Hill.....	915
Delaware, Lackawanna & Western R. R. Co., Lewis v....	909	Emmerich Co. v. Sloane.....	914
Delaware, Lackawanna & Western R. R. Co., Moore v....	908	Episcopal Church of St. Peter's, Washington v.....	402
Demuth Glass Mfg. Co., Brandmeier v.....	919	Equitable Life Assurance Society, Lord v.....	918
Denver & Rio Grande R. R. Co., Clifford v.....	513	Erie R. R. Co., Baird v.....	909
Desmond, People ex rel. Keim v....	757	Ezagui, Sartorelli v.....	925
Dewey, Keese v....	16	<b>F.</b>	
Di Lorenzo v. Di Lorenzo.....	920	Fahnestock Transmitter Co., People ex rel., v. Kelsey....	911
Dibol, People v.....	924	Fahy, Rochester Dry Goods Co. v.....	748
Dillon, Anglo-Continental Chemi- cal Works, Ltd., v.....	418	Fancher v. Fonda, Johnstown & Gloversville R. R. Co.....	4
Dolan, People v....	600	Farrell v. Brooklyn Heights R. R. Co.....	916
Donohue v. American Bridge Co. of New York.....	908	Fay v. Moose River Lumber Co....	907
Dooley, Matter of.....	926		
Driscoll v. Interurban Street R. Co.	915		

# TABLE OF CASES REPORTED.

xi

PAGE.	PAGE.
Federal Match Co., Tanenbaum v. (No. 2)..... 416	Gates, Town of, Myers v..... 909
Feltman, Watt v..... 814	Gause v. Commonwealth Trust Co. 530
Fennelly, People ex rel., v. Amalgamated Copper Co..... 914	Gearin, Matter of Dwyer v..... 911
Fennelly, People ex rel., v. United Copper Co..... 914	Gedney v. Sias.. 925
Fennessy v. Fennessy..... 181	Geneva Mineral Springs Co., Ltd., v. Steele..... 708
Fidelity & Casualty Co., Gaines v.. 386	Gianvecchio, People v..... 924
Fifth Avenue Coach Co., Wulff v. (2 cases)..... 918	Gifford, Roberts v..... 908
Finan v. N. Y. C. & H. R. R. Co. 383	Gilboa, Town of (Matter of Wood). 781
Finucan v. Ramsden..... 920	Gilhooly, Schlesinger v..... 158
First National Bank of Brooklyn v. Gridley..... 920	Gilliam v. Guaranty Trust Co..... 656
Fischer, Gail v..... 909	Gingold, Byron v..... 917
Fitch, Matter of..... 909	Ginsberg, Kushes v. .... 924
Fitter v. Moroney..... 924	Glassberg, Tierstein v..... 916, 919
Flanders v. Rosoff... 1	Glens Falls Portland Cement Co., Vaughn v..... 912
Flinn, People ex rel., v. Cullinan.. 32	Globe & Rutgers Fire Ins. Co. v. Robbins & Myers Co..... 914
Flint Co., Keyes v..... 914	Goldman v. Corn..... 674
Flood v. Patton..... 915	Goldmark v. U. S. Electro-Galvanizing Co..... 526
Flynn v. Smith..... 870	Goodman v. Maze..... 924
Follett v. City of New York..... 917	Gott v. Brooklyn Heights R. R. Co. 919
Fonda, Johnstown & Gloversville R. R. Co., Fancher v..... 4	Graburn, Coles v..... 917, 918
Fox v. Davidson..... 174	Grade Crossing Commissioners of City of Buffalo, Matter of (In re Schneider)..... 909
Fox v. Norton & Dalton Contracting Co..... 915	Granat, Rothman v. .... 921
Freemont v. Boston & Maine R. R. Co..... 831	Grant v. City of New York... 160
French, Berry v..... 910	Grant, Ehrich v..... 196
French, Snook v..... 910	Grape, Hillock v. .... 720
Friedman, Winter v..... 306	Gray v. Siegel-Cooper Co..... 926
Friedmann v. Ramon Hotel Co.... 924	Green, Kragel v..... 925
Friendship, Board of Health of Village of, People ex rel., v. Friez.. 910	Green v. Urban Contracting & Heating Co. .... 926
Friez, People ex rel. Board of Health of Village of Friendship v. 910	Green v. Utica & Mohawk Valley R. Co..... 910
Froment, Matter of. .... 919	Greene, Marine National Bank of Buffalo v..... 908
G.	
Gabler, Berthelson v..... 142	Greene, People ex rel. Dwyer v... 926
Gage v. City of New York..... 914	Greene, People ex rel. Lomax v... 914
Gail v. Fischer.. 909	Gregory v. Elmira Water, Light & R. Co..... 911
Gaines v. Fidelity & Casualty Co.. 386	Gridley, First National Bank of Brooklyn v..... 920
Gallagher v. Newman..... 924	Grinberg, Holly v..... 920
Garth, McVickar Gaillard Realty Co. v..... 924	Griswold, Cardeza v..... 920
	Griswold, Cook v..... 910
	Groppe, Matter of..... 921

	PAGE.		PAGE.
Groton Bridge & Mfg. Co., Knicker-		Hilsinger, Mack v.....	912
bocker v.....	145	Hinckel Brewery Co. v. Newman	
Grout, People ex rel. Uvalde		(Nos. 1 & 2) .....	911
Asphalt Paving Co. v.....	924	Hobby v. Burdick.....	920
Guaranty Trust Co., Gilliam v....	656	Hodes v. City of New York. ....	920
Guth v. Barth.....	919	Hoff v. Reid & Co.....	914
Gwynne v. Altonwood Park Co. of		Hoffman v. Metropolitan Express	
New York.....	920	Co.....	407
		Hoffman House v. Barkley (No. 2). .	564
		Homan Co. v. Murphy.....	908
		Holly v. Grinberg .....	920
		Hood v. Lehigh Valley R. R. Co..	908
		Horning v. Hudson River Tele-	
		phone Co .....	122
		Horowitz, Altkrug v.....	420
		Hosch Co. v. City of New York... .	917
		House, Jennings v.....	917
		Howell, Sweet v.....	911
		Hubbs, Michigan Savings Bank v.	915
		Huddy, Matter of .....	916
		Hudson River Telephone Co.,	
		Horning v.....	122
		Hudson Water Works, Matter of..	860
		Hull, Matter of.....	322, 916
		Hunt, Decker v.....	821
		Huntington v. Herrman.....	875
		Hurst, Matter of.....	460
		Hynds v. Brooklyn Heights R. R.	
		Co.....	839
		I.	
		Ingalls, Jackson v.....	925
		Ingalls v. Perkins.....	911
		Insurance Companies (14), Arling-	
		ton Co. v.....	914
		Insurance Company of New York,	
		Arlington Co. v.....	914
		Interborough Rapid Transit Co.,	
		Arkin v.....	924
		Interborough Rapid Transit Co.,	
		Kohm v.....	925
		Interurban Street R. Co., Coleman	
		v. ....	915
		Interurban Street R. Co., Driscoll	
		v.....	915
		Interurban Street R. Co., Edison	
		v.....	915
		Interurban Street R. Co., Lowry	
		v.....	925

## H.

Hagadorn v. McNair.....	910
Hall v. Cayuga Lake Cement Co..	801
Hall, Matter of.....	912
Hall v. Wagner.....	70
Hammond Co., McGinn v. ....	915
Hand v. Egbert .....	920
Hanlon v. Central R. R. Co. of New	
Jersey .....	918
Hannan v. Boldin. ....	918
Harbeck v. Tobin.....	913
Harris, Connelly v.....	920
Haskin, Matter of.....	754
Haubner v. Metropolitan St. R.	
Co .....	924
Hayes, People ex rel. O'Connell v..	925
Hayes, People ex rel. Stoutenburgh	
v.....	925
Healy v. Buffalo, Rochester & Pitts-	
burgh R. Co .....	618
Hearn v. Stevens & Bro.....	101
Heeran, Century Mercantile Co. v.	
(No. 1).....	910
Heller v. Methner.....	925
Hellman v. City Trust, Safe Deposit	
& Surety Co .....	879
Herrman, Huntington v.....	875
Herrmann, Oser v.....	917
Herzog, Robeson v.....	925
Hessel, Cohn v.....	914
Hester Street School Site, Matter of.	914
Heylman, Lawrence Brothers, Inc.,	
v.....	848
Heyman v. Schlesinger.....	924
Heymann, Van Sant v.....	921
Hicks v. Eggleston .....	918
Higgins, Sinclair v.....	206
Hildreth v. City of New York.....	63
Hill, Elton v.....	915
Hillock v. Grape.....	720

# TABLE OF CASES REPORTED.

xiii

	PAGE.
Interurban Street R. Co., Rudomin v. ....	548
Isnecker, Wilbert v. ....	907

## J.

Jackson v. Ingalls.....	925
Jackson Architectural Iron Works, Sloss Iron & Steel Co. v.....	925
Jacob, Town of Oyster Bay v.....	919
Jennings v. House.....	917
Jetter v. Scollan.....	925
Johnson v. City of New York.....	918
Johnson County Savings Bank v. Phillips.....	914
Johnston, Strobbridge Lithographing Co. v.....	926

## K.

Kamaiky v. Sarasohn.....	925
Kamaiky, Sarasohn v.....	925
Keefe v. Liverpool & London & Globe Insurance Co.....	907
Keese v. Dewey.....	16
Keim, People ex rel., v. Desmond..	757
Kells v. Davis Mfg. Co.....	911
Kelly v. Ashforth.....	922
Kelly, Webel v.....	521
Kelsey, People ex rel. Fahnestock Transmitter Co. v.....	911
Kent, Moran v.....	917
Kettell v. Kettell.....	918
Keyes v. Flint Co.....	914
Kidansky, Robert v.....	475
Kiefer v. Brooklyn Heights R. R. Co.....	404
Kirkwood v. Smith.....	923
Kissick v. Rees.....	292
Kissingner v. Livingstone..	923
Kister, Daly v.....	920
Knickerbocker v. Conger.....	914
Knickerbocker v. Groton Bridge & Mfg. Co.....	145
Knickerbocker Trust Co. v. Ontario, C. & R. S. R. Co.....	812
Kohm v. Interborough Rapid Transit Co.....	925
Kopp, People v.....	924
Kraft, Layton v.....	842
Kragel v. Green.....	925

	PAGE.
Krippendorf, Mark v. ....	908
Kushes v. Ginsberg.....	924

## L.

Lake Erie Wine Cellars, Yetter v..	907
Lally, New York Central & H. R. R. R. Co. v.....	918
Lamberti v. Sun Printing & Publishing Assn.....	437
Lamson, People v.....	924
Landin v. Cunard Steamship Co., Ltd.....	911
Lange v. Schile.....	613
Laubheim, Talbot v.....	915
Lawrence, Dwight v.....	616
Lawrence v. Sias.....	925
Lawrence v. Wilson.....	918
Lawrence Brothers, Inc., v. Heylman.....	848
Lawson, People ex rel., v. Lawson.	473
Lawton v. Partridge.....	8
Layton v. Kraft.....	842
Leggett v. Schwab.....	341
Lehigh Valley R. R. Co., Hood v..	908
Lenorak v. Duffy.....	921
Leonard, Babcock v.....	294
Levis & Co. v. Ehrenberg.....	909
Levy, Mendoza v.....	449
Levy, People ex rel., v. Butler ..	924
Lewis v. Delaware, Lackawanna & Western R. R. Co.....	909
Lewis, Eastman Kodak Co. v.....	924
Lewis, People v.....	558
Lewis, People ex rel. Walters v....	375
Lindheim & Co. v. Central Nat. Realty & Construction Co.....	275
Lindsay, Strait v.....	911
Lindwall v. May.....	457
Linzy v. Whitney.....	908
Lipp, People v.....	504
Liverpool & London & Globe Insurance Co., Keefe v.....	907
Livingstone, Kissingner v.....	923
Loftus v. Straight Line Engine Co.	718
Lomas v. New York City R. Co...	332
Lomax, People ex rel., v. Greene..	914
Lord v. Equitable Life Assurance Society.....	918
Lord, Matter of.....	152

	PAGE.		PAGE.
Lordville & Equinunk Bridge Co. v.		Matter of Dooley.....	926
De Lackner .....	911	Matter of Dwyer v. Gearin.....	911
Lowry v. Interurban Street R. Co.	925	Matter of Fitch.....	909
		Matter of Froment .....	919
<b>M.</b>		Matter of Grade Crossing Commis-	
MacDonald v. Sun Printing & Pub.		sioners of City of Buffalo (In re	
Assn. (No. 2).....	465	Schneider).....	909
MacDonald v. Sun Printing & Pub-		Matter of Groppe.....	921
lishing Assn. (No. 8) ..	467	Matter of Hall.....	912
Mack v. Hilsinger.....	912	Matter of Haskin. ....	754
Mack, Matter of.....	912	Matter of Hester Street School Site.	914
Mackin v. Pettebone Cataract Paper		Matter of Huddy.....	916
Co.....	726	Matter of Hudson Water Works... 860	
Maher, Vroman v.....	912	Matter of Hull. ....	322, 916
Malc, Bowers v.....	209	Matter of Hurst.....	460
Manhattan R. Co., McLaughlin v..	254	Matter of Lord. ....	152
Mann v. Shrive.....	452	Matter of Mack.....	912
Marine National Bank of Buffalo		Matter of Niagara, Lockport &	
v. Greene ...	908	Ontario Power Co. (In re Flaka). 686	
Mark v. Krippendorf.....	908	Matter of Pratt... ..	908
Markham v. Stevenson Brewing		Matter of Ricketts (In re Baker)... 669	
Company.....	178	Matter of Rothschild.....	914
Marlette v. Tumpowski.....	909	Matter of Roxbury... ..	914
Marsh, Smith v.....	913	Matter of Scherer.....	23
Martin, Davis v. ....	411	Matter of School Site, Delancey &	
Martin, Sessler v. ....	917	Rivington Streets.....	914
Martine, McEchron v.....	805	Matter of Shoen v. Scott.....	911
Marx v. Brogan .....	480	Matter of Smith ..	924
Mathot, Terriberry v.....	235	Matter of Smith (In re Scherer &	
Matter of Ashheim. ....	176	Downs).....	23
Matter of Bailey .....	909	Matter of Smith (Ryan Certificate). 910	
Matter of Bishop... ..	545	Matter of Snyder. ....	926
Matter of Board of Examiners (In		Matter of Stevens.....	773
re Jury System of County of		Matter of Strong.....	281
Erle) .....	910	Matter of Tiffany.....	914
Matter of Board of Rapid Transit		Matter of Venable.....	508
Railroad Commissioners for City		Matter of Weeks v. Coe. ....	337
of New York. ....	919	Matter of Whyard.....	919
Matter of Brooklyn Bar Association		Matter of Wiley.. ..	590
(In re Chadsey).....	918	Matter of Wood (In re Town of	
Matter of City of Rochester (In re		Gilboa).....	781
Davis).....	909	May, Lindwall v.....	457
Matter of Colcord .....	916	Maze, Goodman v.....	924
Matter of Collyer.....	917	McAdoo, Peace v.....	919
Matter of Commissioner of Public		McAdoo, People ex rel. Archer v.. 919	
Works of City of New York... 285		McAdoo, People ex rel. Baldwin v.. 916	
Matter of Conner. ....	920	McAuley v. New York Central &	
Matter of Cowles.....	924	H. R. R. R. Co.....	117
Matter of Curtice.....	230	McBride, Cameron v.....	909



# TABLE OF CASES REPORTED.

xv

PAGE.	PAGE.
McCall v. Supreme Council American Legion of Honor..... 911	Metropolitan Street R. Co., Tinson v..... 913
McCormack v. Coddington.... 914	Meyer, Oakes v. .... 924
McDermott, People v..... 380	Michales, People ex rel., v. Ahearn. 741
McDonough v. Pelham Hod Elevating Co..... 585	Michigan Mutual Life Insurance Co., Bannister v..... 765
McEchron v. Martine..... 805	Michigan Savings Bank v. Coy, Hunt & Co. .... 914
McEwen, Voorhees Rubber Manufacturing Co. v..... 541	Michigan Savings Bank v. Hubbs.. 915
McGahie v. Sproat ..... 445	Miller v. Vining..... 917
McGinn v. Hammond Co..... 915	Mink v. Mink ..... 910
McGuinness v. Allison Realty Co.. 926	Mink, Vandervoort v ..... 910
McGuire v. Union Mutual Life Ins. Co. .... 911	Mishkind-Feinberg Realty Co. v. Sidorsky..... 578, 925
McLaughlin v. Manhattan R. Co.. 254	Moder, Zambetti v..... 921
McLoughlin v. Board of Education of City of New York ..... 921	Monahan v. Schenectady R. Co.... 912
McNair, Hagadorn v..... 910	Monjo v. Woodhouse..... 80
McNamara, Oppenheimer v. .... 921	Monroe Eckstein Brewing Co., Snyder v..... 917
McVickar Gaillard Realty Co. v. Garth . .... 924	Moore v. Delaware, Lackawanna & Western R. R. Co..... 908
Mead v. New York Life Ins. Co. (No. 1)..... 909	Moose River Lumber Co., Fay v... 907
Meli v. Metropolitan Street R. Co. 913	Moran v. Kent..... 917
Melody, People ex rel., v. Pound.. 395	Morhard v. Richmond Light & Railroad Co. .... 353
Mendham, Morris & Co., Ltd., v... 915	Moroney, Fitter v..... 924
Mendoza v. Levy..... 449	Morris & Co., Ltd., v. Mendham.. 915
Menzel, People v..... 924	Mt. Morris Bank v. New York & Harlem R. R. Co.. .... 925
Mercantile National Bank of City of New York v. Sire..... 923	Moyer v. Village of Nelliston (2 cases)..... 911
Methner, Heller v..... 925	Mulligan, Barson v. .... 913
Metropolitan Express Co., Hoffman v. .... 407	Mulville v. Metropolitan St. R. Co. .... 915
Metropolitan Life Insurance Co., Baker v ..... 500	Murphy, Hofman Co. v..... 908
Metropolitan Life Insurance Co., Williams v..... 919	Muscatine Mortgage & Trust Co. v. Scott..... 914
Metropolitan Street R. Co., Belotti v..... 925	Mutual Reserve Life Ins. Co., Wade v..... 923
Metropolitan Street R. Co., Haubner v..... 924	Myers v. Town of Gates..... 909
Metropolitan Street R. Co., Meli v. 913	
Metropolitan Street R. Co., Mulville v..... 915	
Metropolitan Street R. Co., Oishei v. 912	
Metropolitan Street R. Co. Oishei v. (No. 2)..... 913	
Metropolitan Street R. Co., Sloane v.. .... 914	

## N.

National Bank of Commerce in New York v. Schlesinger. .... 926
National Surety Co., Sloan v..... 94
Nelliston, Village of, Moyer v. (2 cases)..... 911
Nevius, Powell v..... 909
New Rochelle, City of, Nichols v.. 921

## TABLE OF CASES REPORTED.

PAGE.	PAGE.
New York Athletic Club, Beecroft v..... 892	New York Evening Journal Publishing Co., Carpenter v..... 286
New York, Board of Rapid Transit Railroad Commissioners for City of, Matter of ..... 910	New York & Harlem R. R. Co., Caldwell v. .... 164
New York, Brooklyn & Manhattan Beach R. Co., Remsen v..... 418	New York & Harlem R. R. Co., Mt. Morris Bank v..... 925
New York Central & H. R. R. Co., Branson v..... 787	New York & Harlem R. R. Co., Tynberg v..... 925
New York Central & H. R. R. Co., Burke v..... 915	New York & Harlem R. R. Co., Wallach v..... 278
New York Central & H. R. R. R. Clifford v..... 809	New York Life Insurance Co., Mead v. (No. 1)..... 909
New York Central & H. R. R. R. Co., Finan v..... 888	New York Life Insurance Co., People ex rel. Venner v..... 183
New York Central & H. R. R. R. Co. v. Lally..... 918	New York Milk Products Co., Wilson v..... 909
New York Central & H. R. R. R. Co., McAuley v ..... 117	New York Mortgage & Security Co. v. Concourse Park Hotel Co. .... 919
New York Central & H. R. R. R. Co., Paige v..... 828	New York & Queens County R. Co., Driscoll v..... 920
New York Central & H. R. R. R. Co., Pitkin v. .... 908	New York Telephone Co., Bunke v..... 925
New York Central & H. R. R. R. Co., Raymond v..... 910	New-Yorker Staats-Zeitung, Nunnally v..... 482
New York Central & H. R. R. R. Co., Wilcox v..... 908, 910	Newman, Gallagher v..... 924
New York, City of, Crowley v... 917	Newman, Hinckel Brewery Co. v. (Nos. 1 & 2)..... 911
New York, City of, Ebbets v..... 364	Newton Falls Paper Co., Walker v..... 19
New York, City of, Follett v..... 917	Niagara County Irrigation & Water Supply Co. v. College Heights Land Co..... 770
New York, City of, Gage v..... 914	Niagara, Lockport & Ontario Power Co., Matter of (In re Flaka)..... 686
New York, City of, Grant v..... 160	Nichols v. City of New Rochelle... 921
New York, City of, Hildreth v..... 68	Niemann v. Cordtmeyer ..... 326
New York, City of, Hodes v..... 920	Noel, Walrod v..... 911
New York, City of, Hosch Co. v.. 917	North v. North..... 921
New York, City of, Johnson v..... 918	North Hempstead, Town of, v. Eldridge..... 789
New York, City of, Parks v..... 886	Norton & Dalton Contracting Co., Fox v..... 915
New York, City of, Pymm v..... 830	Nowak v. Barkas..... 921
New York, City of, Standard Publishing Co. v..... 260	Nunnally v. New-Yorker Staats-Zeitung..... 482
New York, City of, Stevens v..... 362	Nunnally v. Tribune Association.. 485
New York, City of, Triest v..... 921	Nussbaum v. Brooklyn Ferry Co. of New York..... 921
New York, City of, Wahrman v.. 345	
New York, City of, Board of Education of, McLoughlin v..... 921	
New York City R. Co., Lomas v... 382	
New York City R. Co., Sallie v.... 925	
New York City R. Co., Senior v... 39	
New York Edison Co., Bean v. ... 914	

## xvii

O.

PAGE.

PAGE.

O'Connell, People ex rel., v. Hayes.	925
Oakes v. Meyer .....	924
Oil Well Supply Co. v. Phoenix Iron Works Co .....	909
Oishei v. Metropolitan Street R. Co.....	912
Oishei v. Metropolitan Street R. Co. (No. 2).....	913
Okun, Wolinsky v.....	536
Oneonta, C. & R. S. R. Co., Knickerbocker Trust Co. v.....	812
Oppenheimer v. McNamara.....	921
Osborne v. Auburn Telephone Co..	702
Oser v. Herrmann.....	917
Ossining, Village of, Rodrigues v..	297
Owego Gas Light Co. v. Boyer....	140
Oyster Bay, Town of, v. Jacob....	919

P.

Page Lumber Co., St. Regis Paper Co. v.....	108
Paige v. New York Central & H. R. R. Co .....	828
Palmer Insurance Co., Ltd., Uhlfelder v. ....	57
Palmer, Brown v. ....	909
Parks v. City of New York.....	836
Parsons v. Teller.....	637
Partridge, Lawton v. ....	8
Partridge, People ex rel. Burke v.....	923
Patton, Flood v.....	915
Payne, Cooper v. ....	785
Peabody, Corn Exchange Bank v..	553
Peace v. McAdoo. ....	919
Pearsall v. Stewart.....	919
Pelham Hod Elevating Co., McDonough v.....	585
People ex rel. Michales v. Ahearn.	741
People ex rel. Fennelly v. Amalgamated Copper Co .....	914
People ex rel. Brown v. Baker....	926
People ex rel. Collins v. Brower....	915
People ex rel. Levy v. Butler.....	924
People v. Christianna .....	917
People ex rel. Flinn v. Cullinan....	32
People ex rel. Keim v. Desmond..	757
People v. Dibol.....	924
People v. Dolan .....	600

People ex rel. Board of Health of Village of Friendship v. Friez...	910
People v. Gianvecchio....	924
People ex rel. Dwyer v. Greene...	926
People ex rel. Lomax v. Greene...	914
People ex rel. Uvalde Asphalt Paving Co. v. Grout.....	924
People ex rel. O'Connell v. Hayes..	925
People ex rel. Stoutenburgh v. Hayes.....	925
People ex rel. Fahnestock Transmitter Co. v. Kelsey .....	911
People v. Kopp.....	924
People v. Lamson.....	924
People ex rel. Lawson v. Lawson..	473
People v. Lewis.....	558
People ex rel. Walters v. Lewis....	375
People v. Lipp.....	504
People ex rel. Archer v. McAdoo..	919
People ex rel. Baldwin v. McAdoo..	916
People v. McDermott.....	380
People v. Menzel.....	924
People ex rel. Venner v. New York Life Insurance Co. ....	183
People ex rel. Burke v. Partridge..	923
People ex rel. Bidwell v. Pitts....	919
	312
People ex rel. Cook v. Pitts.....	321
People ex rel. Melody v. Pound....	395
People v. Sekeson.....	490
People ex rel. Fennelly v. United Copper Co. ....	914
People v. Weisberg.....	924
Perkins, Ingalls v.....	911
Pettebone Cataract Paper Co., Makin v.....	726
Phelps v. Phelps.....	921
Phillips, Johnson County Savings Bank v.....	914
Phoenix Iron Works Co., Oil Well Supply Co. v.....	909
Pierson, Allen v. ....	908
Piper v. Seager.....	113
Pitkin v. N. Y. C. & H. R. R. R. Co.....	908
Pitts, People ex rel. Bidwell v. ....	319, 912
Pitts, People ex rel. Cook v.....	32
Post, Walden v.....	91
Pound, People ex rel. Melody v....	39A
Powell v. Nevins.....	809

	PAGE.		PAGE.
Pratt, Matter of.....	908	Rosenfeld v. Central Vermont R. Co.	371
Press Publishing Co., Basso v....	915	Rosoff, Flanders v.....	1
Prudential Insurance Co. of Amer- ica, Ryer v. ....	916	Rothman v. Granat.....	921
Pymm v. City of New York.....	330	Rothschild, Bankers' Surety Co. v.	130
		Rothschild, Matter of..	914
		Rourke v. Elk Drug Co.....	912
		Roxbury, Matter of.....	914
		Rudomin v. Interurban Street R. Co.....	548
		Rusaw, Stoddard v .....	909
		Russell v. Barron. ....	382
		Russlend v. Bridge. ....	918
		Ryan Certificate (In re Smith)....	910
		Ryan, Smith v. ....	924, 926
		Ryer v. Prudential Insurance Co. of America.....	916
		S.	
		Sachs v. Rose.....	917
		Sackett & Wilhelms Lithographing & Printing Co. v. Cummins.....	300
		Sadler v. Bohm. ....	926
		Sallie v. New York City R. Co....	925
		Sarasohn, Kamaiky v.....	925
		Sarasohn v. Kamaiky.....	925
		Sartorelli v. Ezagui. ....	925
		Savage v. Brooklyn Heights R. R. Co.....	916
		Schmalholz v. Schmalholz.....	543
		Schenectady R. Co., Monahan v....	912
		Scherer, Matter of.....	23
		Scheuer, Schlesinger v.....	926
		Schile, Lange v. ....	613
		Schlesinger v. Gilhooly.....	153
		Schlesinger, Heyman v.....	924
		Schlesinger, National Bank of Com- merce in New York v.....	926
		Schlesinger v. Scheuer.....	926
		Schmitz v. Brooklyn Union Ele- vated R. R. Co. ....	308
		Schneider, Matter of (In re Grade Crossing Comrs., City of Buffalo).	909
		School Site, Matter of, Delancey & Rivington Streets...	914
		Schreyer, Deering v.....	914
		Schultz, von der Born v .....	263
		Schwab, Leggett v.....	341
		Scollan, Jetter v.....	925
		Scott, Matter of Shoen v.....	911
R.			
Rairden, Wood v. ....	303		
Ramon Hotel Co., Friedmann v....	924		
Ramsdell, Ricketts v.....	916		
Ramsden, Finucan v .....	920		
Randolph, Williamson v.....	539		
Ratigan, Daley v.....	911		
Raymond v. N. Y. C. & H. R. R. R. Co.....	910		
Raymond v. Security Trust & Life Insurance Co. ....	191		
Reardon v. Woerner .....	259		
Reda v. Rohrich.. ....	914		
Rees, Kissick v.....	292		
Reid, Tracey v.....	396		
Reid & Co., Hoff v. ....	914		
Reineldt, Daly v.....	917		
Reiners, Andrews v.....	435, 916		
Remington & Son Pulp & Paper Co. v. Water Commissioners of City of Watertown.....	907		
Remsen v. New York, Brooklyn & Manhattan Beach R. Co.....	413		
Reno v. Thompson.....	316		
Rice v. Town of Adams. ....	910		
Richmond Light & Railroad Co., Morhard v. ....	353		
Ricketts, Matter of (In re Baker)...	669		
Ricketts v. Ramsdell.....	916		
Riser, Conlen v. ....	925		
Robbins & Myers Co., Globe & Rutgers Fire Ins. Co. v.....	914		
Robert v. Kidansky.....	475		
Roberts v. Gifford.....	908		
Robertson v. de Brulatour.....	882		
Robeson v. Herzog.....	925		
Rochester, City of, Matter of (In re Davis).....	909		
Rochester Dry Goods Co. v. Fahy..	748		
Rodrigues v. Village of Ossining..	297		
Rohrich, Reda v. ....	914		
Rollins v. Bowman Cycle Co.....	915		
Rose, Sachs v.....	917		

# TABLE OF CASES REPORTED.

xix

	PAGE.		PAGE.
Scott, Muscatine Mortgage & Trust Co. v.....	914	Snook v. French .....	910
Scovill, Clark v.....	85	Snyder, Matter of .....	926
Scribner v. Young.....	814	Snyder v. Monroe Eckstein Brewing Co.....	917
Seager, Piper v.....	113	Sparrow Theatrical & Amusement Co., Ltd., Barnett v.....	919
Security Trust & Life Insurance Co., Raymond v. . . . .	191	Sproat, McGahle v.....	415
Sekeson, People v.....	490	St. Regis Paper Co. v. Page Lum-ber Co.....	108
Senior v. New York City Railway Co.....	39	Standard Publishing Co. v. City of New York.....	260
Sessler v. Martin.....	917	Starkey v. Webster.....	916
Seymour, City of Elmira v.....	199	Staten Island Water Supply Co., Whitehouse v.....	919
Shaughnessy v. Weekes.....	918	Steele, Geneva Mineral Springs Co., Ltd., v. ....	706
Shaw v. Cooke.....	202	Sterling v. Chapin.....	912
Shea, Cunningham v.....	624	Sterling, Cramsey v.....	568
Shirmer, Urbansky v.....	50	Stern, Barrett Chemical Co. v.....	913
Shoen, Matter of, v. Scott.....	911	Stevens v. City of New York .....	362
Shonts v. Thomas .....	916	Stevens, Matter of.....	773
Shrive, Mann v. . . . .	452	Stevens v. Taylor....	561
Sias, Gedney v.....	925	Stevens & Bro., Hearn v.....	101
Sias, Lawrence v.....	925	Stevenson Brewing Company, Markham v. ....	178
Sidorsky, Mishkind-Feinberg Realty Co. v.....	578, 925	Stewart, Pearsall v.....	919
Siegel-Cooper Co., Gray v .....	926	Stoddard v. Rusaw. . . . .	909
Silverman Realty & Construction Co., Williams v.....	679	Stoutenburgh, People ex rel., v. Hayes.....	925
Sinclair v. Higgins. . . . .	206	Straight Line Engine Co., Loftus v. . . . .	718
Sire, Mercantile National Bank of City of New York v.....	923	Strait v. Lindsay.....	911
Sloan v. National Surety Co.....	94	Strobridge Lithographing Co. v. Johnston.....	926
Sloane, Emmerich Co. v .....	914	Strong, Matter of.....	281
Sloane v. Metropolitan Street R. Co.	914	Stronge v. Supreme Lodge, Knights of Pythias. . . . .	87
Slocum v. Town .....	911	Stump v. Butterfield.....	916
Sloss Iron & Steel Co. v. Jackson Architectural Iron Works.....	925	Sun Printing & Publishing Assn., Lamberti v.....	437
Smith v. Bleier .....	914	Sun Printing & Publishing Assn., MacDonald v. (No. 2).....	465
Smith, Flynn v.....	870	Sun Printing & Publishing Assn., MacDonald v. (No. 3).....	467
Smith, Kirkwood v.....	923	Supreme Council American Legion of Honor, McCall v.....	911
Smith v. Marsh.....	913	Supreme Lodge, Knights of Pythias, Stronge v.....	87
Smith, Matter of.....	924	Swanston, Bengeston v.....	919
Smith, Matter of (In re Scherer & Downs) . . . . .	23		
Smith, Matter of (Ryan Certificate).	910		
Smith v. Ryan .....	924, 926		
Smith, United States Condensed Milk Co. v.....	908		
Snider, Wood v.....	908		



# TABLE OF CASES REPORTED.

xxi

	PAGE.		PAGE.
Wallach v. New York & Harlem R. R. Co. ....	273	Wilbert v. Isnecker.....	907
Wallerstein, Weber v. (No. 1)....	693	Wilcox v. N. Y. C. & H. R. R. R. Co.....	908, 910
Wallerstein, Weber v. (No. 2) ..	700	Wiley, Matter of.....	590
Walrod v. Noel.....	911	Williams v. Metropolitan Life Ins. Co.....	919
Walters, People ex rel., v. Lewis..	375	Williams v. Silverman Realty & Construction Co.....	679
Walton, Town of, v. Adair.....	817	Williams v. Wilson & McNeal Co..	442
Wander v. Wander.....	189	Williamson v. Randolph.....	539
Washington v. Episcopal Church of St. Peter's .....	402	Wilson, Lawrence v.....	918
Water Commissioners of City of Watertown, Remington & Son Pulp & Paper Co. v.....	907	Wilson v. New York Milk Products Co.....	909
Watertown, City of, Water Comrs. of, Remington & Son Pulp & Paper Co. v.....	907	Wilson v. Weissel.....	916, 921
Watt v. Feltman.....	314	Wilson & McNeal Co., Williams v.	442
Webel v. Kelly. ....	521	Winchell v. Town of Camillus....	910
Weber v. Wallerstein. (No. 1)....	693	Winter v. Friedman.....	306
Weber v. Wallerstein. (No. 2) ...	700	Winton Motor Carriage Co., Chi- chester v.....	918
Webster, Starkey v.....	916	Woerner, Reardon v.....	259
Weddigan v. Whiting (2 cases)....	907	Wolinsky v. Okun.....	536
Weekes, Shaughnessy v.....	918	Wood, Matter of (In re Town of Gilboa).....	781
Weeks, Briggs v.....	908	Wood v. Rairden.....	303
Weeks, Matter of, v. Coe.....	337	Wood v. Snider.....	908
Weisberg, People v.....	924	Woodhouse, Monjo v.....	80
Weissel, Wilson v.....	916, 921	Worden v. Bentley.....	910
Wendin v. Brooklyn Heights R. R. Co. ....	390	Wulff v. Fifth Avenue Coach Co. (2 cases).....	918
Whitbeck, Van Sant v.....	921		
Whitehead, Beardsworth v.....	923		
Whitehouse v. Staten Island Water Supply Co.....	919		
Whiting, Weddigan v. (2 cases)....	907		
Whitney, Blum v .....	922		
Whitney, Linzy v.....	908		
Whyard, Matter of.....	919		

## Y.

Yetter v. Lake Erie Wine Cellars..	907
Young, Scribner v.....	814

## Z.

Zambetti v. Moder.....	921
------------------------	-----

010  
08



## TABLE OF CASES CITED.

### A.

	PAGE.
Ackerman v. Trus. ....	175 N. Y. 353..... 683, 685
Ahern v. Steele. ....	115 N. Y. 203, 209... 403, 459
Ahrens v. City of Rochester. ....	97 App. Div. 480..... 366
Arkenburgh v. Arkenburgh. ....	27 Misc. Rep. 760..... 30
Arkenburgh v. Little.....	49 App. Div. 636.... 30
Arnot v. Union Salt Co.....	109 App. Div. 433, 440..... 912
Ayers v. Rochester Railway Co.....	156 N. Y. 104..... 406

### B.

Badger v. Badger.....	88 N. Y. 546..... 576
Bailey v. Fransioli.....	101 App. Div. 140..... 363, 351
Baird v. Baird .....	145 N. Y. 659..... 641
Baker v. Bucklin.....	43 App. Div. 336..... 34
Baker v. Drake.....	53 N. Y. 211..... 435, 556
Ball v. Loomis. ....	29 N. Y. 412..... 100
Barber v. Kendall.....	158 N. Y. 401..... 265
Barhite v. Home Telephone Co.....	50 App. Div. 25..... 704
Barnes v. Brown.....	130 N. Y. 372..... 556
Barton v. City of Syracuse.....	36 N. Y. 54..... 366
Bates v. Holbrook.....	89 App. Div. 548; appeal dis- missed, 178 N. Y. 568..... 172
Baucus v. Barr.....	45 Hun, 582; affd., 107 N. Y. 624. 283
Baucus v. Stover.....	89 N. Y. 1..... 283
Baulec v. New York & Harlem R. R. Co.	59 N. Y. 356, 365..... 437
Baumann v. Manhattan Consumers' Brewing Co.....	97 App. Div. 470..... 361
Beatty's Exr. v. Lalor.....	15 N. J. Eq. 108, 110, 111..... 463
Beck v. McGillis.....	9 Barb. 59..... 463
Bedell v. Bedell.....	37 Hun, 419.. 576, 874
Bedell v. Carll.....	33 N. Y. 581..... 503
Belger v. Dinsmore.....	51 N. Y. 166.. 409
Beltz v. City of Yonkers ..	148 N. Y. 67..... 299
Beman v. Todd.....	124 N. Y. 114. 280
Bendernagle v. Cocks.....	19 Wend. 207..... 414
Benedict v. Lynch.....	1 Johns. Ch. 370..... 3
Bennett v. Pittman.....	48 Hun, 612..... 512
Berrigan v. N. Y., L. E. & W. R. R. Co.	131 N. Y. 582, 585..... 833
Billings v. Billings.....	73 App. Div. 69..... 248, 251, 252
Billings v. Russell.....	101 N. Y. 226..... 368
Birdsall v. Clark.....	72 N. Y. 73..... 628, 636

	PAGE.
Birrell v. New York & Harlem R. R. Co.	198 U. S. 390..... 167
Blackwood v. Burrowes.....	2 Con. & L. 459..... 858
Blagge v. Miles.....	1 Story, 426..... 14
Blanchard v. Trim.....	38 N. Y. 225..... 881
Blinn v. Schwarz.....	177 N. Y. 252..... 644
Blitz v. United States.....	153 U. S. 808 ..... 560
Blood v. Kane.....	130 N. Y. 514, 517..... 427, 464
Bloodgood v. Mohawk & H. R. R. Co..	18 Wend. 9..... 691
Bly v. Edison Electric Illuminating Co.	54 App. Div. 427; 172 N. Y. 1... 171
Board of Excise v. Sackrider.....	35 N. Y. 154..... 628, 636
Boisaubin v. Reed.....	{ 1 Abb. Ct. App. Dec. 161; 2 Keyes, 323. .... 826
Boller v. Boller. ....	96 App. Div. 163..... 249
Bolte v. Third Ave. R. R. Co.....	38 App. Div. 234..... 552
Bond v. Smith.....	113 N. Y. 378..... 905
Bookman v. New York Elevated R. R. Co.....	{ 137 N. Y. 302 ..... 313, 314
Boston Nat. Bank v. Armour .....	50 Hun, 176, 177..... 338
Boyd v. Daily .....	85 App. Div. 581..... 425
Boyd v. Vale .....	84 App. Div. 414..... 361
Brainard v. Nassau Electric R. R. Co..	44 App. Div. 613..... 335
Brainerd v. White.....	12 Abb. N. C. 407..... 278
Brandt v. Morning Journal Associa- tion.....	{ 81 App. Div. 183; affd., 177 N. Y. 544 ..... 270, 271
Brass v. Rathbone.....	153 N. Y. 435 ..... 677, 678
Bresel v. Browning.....	109 App. Div. 588..... 238
Breslin v. Peck .....	38 Hun, 623..... 841
Briegel v. Philadelphia.....	135 Penn. St. 451..... 352
Briggs v. Mitchell.....	60 Barb. 288..... 850
Brinckerhoff v. Bostwick.....	88 N. Y. 52, 59..... 698
Britton v. Ferrin.....	171 N. Y. 235..... 615
Broadbelt v. Loew .....	15 App. Div. 343..... 685
Broistedt v. South Side Railroad Co. of Long Island.....	{ 55 N. Y. 220..... 416
Bronson v. Wiman.....	8 N. Y. 188..... 444
Brown v. City of New York.....	32 Misc. Rep. 571 ..... 352
Brown v. Lamphear.....	35 Vt. 252..... 872
Brown v. Mayor .....	66 N. Y. 385..... 265
Brown v. McCune.....	5 Sandf. 224..... 651, 652
Browning v. Home Ins. Co.....	71 N. Y. 508..... 62
Brox v. Riker.....	56 App. Div. 391..... 278
Brumskill v. James.....	11 N. Y. 294..... 11
Buchanan v. Tilden.....	158 N. Y. 109..... 753
Buck v. Village of Glens Falls.....	4 App. Div. 323. .... 299
Buckley v. G. P. & R. M. Co.....	113 N. Y. 540..... 733
Burke v. Baker.....	104 App. Div. 26..... 424
Burke v. Burpo.....	75 Hun, 568. .... 636

# TABLE OF CASES CITED.

XXV

	PAGE
Burke v. Tindale .....	{ 12 Misc. Rep. 81, 82; affd., 155 N. Y. 673 ..... 459
Burnham v. Brennan.....	74 N. Y. 597 ..... 369
Butler v. Supreme Council....	105 App. Div. 164..... 911
Butler v. Wright.....	103 App. Div. 463. .... 198
Byrnes v. City of Cohoes.....	67 N. Y. 204..... 366

## C.

Caglione v. Mt. Morris Electric Light Co.....	{ 56 App. Div. 191..... 357
Cameron v. N. Y. C. & H. R. R. Co.	145 N. Y. 400. . . . . 487
Carling v. Carling .....	42 Misc. Rep. 492..... 259
Carpenter v. New York Evening Journal Pub. Co....	{ 96 App. Div. 876..... 267
Carrington v. City of St. Louis.....	89 Mo. 208..... 352
Cassani v. Dunn.....	44 App. Div. 248..... 100
Cassery v. Witherbee.....	119 N. Y. 522. .... 99
Castle v. Bell Telephone Co.....	49 App. Div. 437..... 704
Caulfield v. Sullivan.....	85 N. Y. 153 . . . . . 646
Charter v. Stevens .....	3 Den. 38..... 99
Chatfield v. Hewlett.....	2 Dem. 191..... 29
Cheney v. Woodruff .....	45 N. Y. 98..... 62
Chester v. Buffalo Car Mfg. Co .....	70 App. Div. 443, 457..... 427, 894
City of Ithaca v. Babcock .....	72 App. Div. 260..... 759
City of New York v. Herdje.....	68 App. Div. 870..... 453
City of Rochester v. Bell Telephone Co..	52 App. Div. 6..... 704
Clark v. City of Rochester.....	43 Hun, 271 . . . . . 366
Clark v. Village of Dunkirk.....	12 Hun, 188 . . . . . 760
Clark v. Wilcklow .....	75 Hun, 290 . . . . . 815
Clements v. Sherwood-Dunn.....	108 App. Div. 327..... 198
Cochran v. Elwell.....	46 N. J. Eq. 333 . . . . . 86
Cohen v. Mayor, etc., of New York....	113 N. Y. 582..... 840
Cohn v. Beckhardt.....	68 Hun, 888..... 615
Cole v. M. I. Co.....	133 N. Y. 164..... 194
Coleman v. Burr.....	93 N. Y. 17, 31 . . . . . 851
Commonwealth v. Clap.....	4 Mass. 163..... 467
Commonwealth v. Clapp .....	82 Mass. (16 Gray) 237..... 560
Comstock v. Drohan.....	71 N. Y. 9..... 479
Conger v. Conger.....	105 App. Div. 590..... 756
Congreve v. Smith .....	18 N. Y. 79..... 332
Connor v. Bernheimer.....	6 Daly, 295. .... 459
Conrad v. Trustees of the Village of Ithaca.....	{ 16 N. Y. 158..... 133
Conte v. Conte.....	82 App. Div. 385..... 190
Cook v. New York Elevated R. R. Co..	144 N. Y. 115, 119..... 813, 814
Coolidge v. City of New York.....	99 App. Div. 175..... 837
Conoley v. Anderson.....	1 Hill, 519..... 444

	PAGE.
Cooper v. Payne.....	103 App. Div. 118..... 787
Coosaw Mining Co. v. South Carolina...	144 U. S. 550, 561..... 46
Coppins v. N. Y. C. & H. R. R. R. Co..	43 Hun, 26..... 621
Corbett v. Gibson.....	18 Hun, 49..... 916
Corning v. Troy Iron & Nail Factory...	40 N. Y. 191..... 416
Corr v. Sun Printing & Pub. Assn.....	177 N. Y. 181, 185..... 483, 489
Coyne v. Weaver.....	84 N. Y. 386..... 369
Crain v. United States.....	162 U. S. 625..... 560
Crane v. Bennett.....	177 N. Y. 106..... 271, 556
Crowe v. Lewin.....	95 N. Y. 423..... 874
Crown v. Orr.....	140 N. Y. 450..... 257, 733
Curtis v. Tyler.....	9 Paige, 432..... 477
Cushman v. Horton.....	59 N. Y. 149, 151..... 666, 667
Cutter v. Gudebrod Brothers Co.....	168 N. Y. 512..... 191
Cuyler v. McCartney.....	40 N. Y. 221..... 369
Cuyler v. Vanderwerk.....	1 Johns. Cas. (2d ed.) 247..... 719

## D.

Dana v. Fiedler.....	12 N. Y. 40..... 234
Davenport v. Ruckman.....	37 N. Y. 568..... 332
Davidson v. Fox.....	65 App. Div. 262..... 175
Davis v. Morris.....	36 N. Y. 569..... 414
Davis v. Newkirk.....	5 Den. 92..... 100
De Graff v. N. Y. C. & H. R. R. R. Co.	70 N. Y. 125..... 257
De Meli v. De Meli.....	67 How. Pr. 20..... 448
DeLafield v. Village of Westfield..	{ 41 App. Div. 24; affd., 169 N. Y. 582..... 181
Demarest v. Mayor, etc., of N. Y....	147 N. Y. 208..... 162
Demarest v. Willard.....	8 Cow. 209..... 112
Dexter v. Supreme Council.....	97 App. Div. 545..... 92
Diman v. Providence, W. & B. R. R. Co.	5 R. I. 130..... 874
Ditmas v. McKane.....	87 App. Div. 54..... 424
Dochtermann v. Brooklyn Heights R. R.	{ 32 App. Div. 13; affd., 164 N. Y. 586..... 335
Dodge v. Wellman.....	1 Abb. Ct. App. Dec. 512..... 881
Dodin v. Dodin.....	{ 16 App. Div. 42; affd., 163 N. Y. 635..... 662, 665, 667
Dolan v. Mayor, etc., of N. Y....	68 N. Y. 274, 280, 281..... 162
Donahue v. Keystone Gas Co.....	181 N. Y. 318..... 705
Donohue v. People.....	56 N. Y. 208, 213..... 602
Donovan v. Board of Education of City	{ 85 N. Y. 117..... 351
of N. Y.....	
Donovan v. City of Oswego.....	90 App. Div. 397, 401..... 759
Dougherty v. Thompson.....	167 N. Y. 487..... 661
Doyle v. Lord.....	64 N. Y. 432..... 563, 678
Dubuc v. Lazell, Dalley & Co.....	182 N. Y. 482..... 236, 916
Duncan v. N. Y. Mutual Ins. Co.....	188 N. Y. 88..... 874

# TABLE OF CASES CITED.

xxvii

	PAGE.
Dwyer v. President, etc., D. & H. Canal Co.....	17 App. Div. 623..... 810
Dyett v. Hyman.....	129 N. Y. 351..... 100

## E.

Earl v. Earl.....	96 App. Div. 639..... 190
Earl v. Peck.....	64 N. Y. 596..... 642
Earle v. Robinson.....	91 Hun, 363; affd., 157 N. Y. 688. 788
Eastland v. Clarke.....	165 N. Y. 420. .... 21
Eaton v. D., L. & W. R. R. Co.....	57 N. Y. 382..... 588
Eddy v. London Assurance Corporation.....	143 N. Y. 811..... 61
Eddy v. Village of Ellicottville.....	85 App. Div. 256..... 906
Eels v. American Telephone & Telegraph Co.....	143 N. Y. 138..... 704
Ehlen v. Mayor, etc., of Baltimore.....	76 Md. 576; 25 Atl. Rep. 917..... 857
Ehrgott v. Mayor, etc., of City of N. Y.....	96 N. Y. 264..... 550, 551
Eichholz v. Niagara Falls H. P. & M. Co.....	68 App. Div. 441; affd., 174 N. Y. 519..... 551
Eighmie v. Taylor.....	98 N. Y. 288..... 308
Eisenlord v. Clum.....	126 N. Y. 563..... 845
Electric Boat Co. v. Howey.....	96 App. Div. 410 . .... 191
Eleventh Ward Bank v. Powers..	43 App. Div. 178..... 582
Elwood v. Western Union Tel. Co.....	45 N. Y. 549..... 450
Embler v. Hartford S. B. Ins. Co.....	158 N. Y. 431, 436..... 753
Excelsior Terra Cotta Co. v. Harde....	90 App. Div. 4; affd., 181 N. Y. 11. 175 180
Executor of O. Bigelow v. Adm's. of E Bigelow.....	4 Ohio, 188..... 463

## F.

Farmers' Loan & Trust Co. v. New York & Northern R. Co.....	150 N. Y. 410, 425..... 48
Farmers' Loan & Trust Co. v. San Diego St. Car Co.....	45 Fed. Rep. 518, 527.. .... 228
Farrelly v. Emigrant Industrial Savings Bank.....	93 App. Div. 529, 531.. .... 453
Ferguson v. Hubbell.....	97 N. Y. 507.. .... 434
Field v. Schieffelin.....	7 Johns. Ch. 150..... 427
Fielden v. Lahens.....	2 Abb. Ct. App. Dec. 111..... 11
First Nat. Bank v. Miller.....	163 N. Y. 167..... 850
Fischer v. Hope Mutual Life Ins. Co....	69 N. Y. 161..... 195
Fischer-Hansen v. Brooklyn Heights R. R. Co.....	173 N. Y. 492..... 29
Fisher v. Mayor.....	67 N. Y. 77..... 425
Fitzgerald v. Alexander. ....	19 Wend. 403..... 328
Flagg v. Fisk.....	93 App. Div. 169..... 418

	PAGE.
Flagler v. Hearst .....	91 App. Div. 12..... 555-537
Fleischmann v. Bennett.....	87 N. Y. 231..... 489
Flinn v. N. Y. C. & H. R. R. Co ...	142 N. Y. 11..... 621
Flynn v. Brooklyn City R. R. Co.....	158 N. Y. 493, 504, 508..... 187, 697
Foot v. Ffoulke.....	55 App. Div. 617..... 615
Ford v. Ford.....	143 Mass. 577..... 448
Fordham v. Gouverneur Village.....	160 N. Y. 541..... 905
Foster v. Bookwalter .....	152 N. Y. 166. .... 431, 453
Fowler v. Bowery Savings Bank.....	113 N. Y. 450..... 463
Fowler v. Ingersoll.....	127 N. Y. 472..... 597
Fox v. Davidson.....	36 App. Div. 159; 40 id. 620..... 175
Frace v. N. Y., L. E. & W. R. R. Co..	143 N. Y. 182..... 621
Fries v. New York & Harlem R. R. Co.	169 N. Y. 270..... 274
Fulkerson v. Holmes.....	117 U. S. 397... .. 845

## G.

Gaines v. Fidelity & Casualty Co.....	93 App. Div. 524..... 388
Gall v. Gall.....	114 N. Y. 109. .... 576
Gallagher v. Nichols.....	60 N. Y. 438 ..... 881
Galloway v. Chicago, M. & St. P. Ry. Co.	56 Minn. 346..... 811
Gilvin v. Mayor, etc., of New York...	112 N. Y. 223, 226.. .... 352, 906
Garbaczewski v. Third Ave. R. R. Co..	5 App. Div. 186..... 552
Gause v. Commonwealth Trust Co.....	100 App. Div. 427, 429 ..... 531, 533
Gearty v. Mayor, etc., of New York....	183 N. Y. 233..... 398
Genet v. D. & H. Canal Co.....	136 N. Y. 593..... 107
Geneva Mineral Springs Co. v. Coursey.....	45 App. Div. 268; 57 id. 620; 171 N. Y. 664..... 709
Germania Fire Ins. Co. v. M. & C. R. Co.....	72 N. Y. 90..... 409
Geyer v. Snyder.....	140 N. Y. 394, 400... .. 431
Gilbert v. Finch.....	72 App. Div. 38; affd., 173 N. Y. 455..... 194
Gildersleeve v. Landon ..	73 N. Y. 609..... 450
Gilmore v. Brooklyn Heights R. R. Co.	6 App. Div. 117. .... 335
Gilmour v. Colcord.....	96 App. Div. 353..... 851
Glens Falls Portland Cement Co. v. Travelers' Ins. Co.....	162 N. Y. 402..... 21
Godfrey v. City of New York.....	104 App. Div. 357..... 840
Goodwin v. Griffiths.....	88 N. Y. 629..... 615
Gould v. Hudson River R. R. Co.....	6 N. Y. 522..... 793
Graham v. Bauland Co.....	97 App. Div. 141..... 551
Gray v. Seigel-Cooper Co.....	78 App. Div. 118, 123..... 926
Green v. Roworth.....	113 N. Y. 462..... 576
Griffen v. Manice.....	166 N. Y. 188... .. 335
Griffin v. Interurban St. Ry. Co.....	179 N. Y. 447..... 46
Griffith v. Robertson.....	15 Hun, 344..... 477

# TABLE OF CASES CITED.

xxix

	PAGE.
Grotsch v. Steinway R. Co.....	19 App. Div. 130..... 384
Gunnison v. Board of Education.....	176 N. Y. 11..... 381
Guy v. Craighead.....	40 App. Div. 260..... 370

## H.

Haefelin v. McDonald.....	96 App. Div. 222..... 752
Hahl v. Sugo.....	169 N. Y. 109..... 414, 416
Haight v. Continental Ins. Co.....	92 N. Y. 51..... 62
Halbert v. Gibbs.....	16 App. Div. 126..... 80
Ham v. Mayor.....	70 N. Y. 459..... 352
Hamer v. Sidway.....	124 N. Y. 538..... 643
Harley v. B. C. M. Co.....	142 N. Y. 81..... 621
Harrington v. Higham.....	15 Barb. 624..... 11
Harris v. Pepperell.....	L. R. 5 Eq. 1..... 874
Hart v. Hudson River Bridge Co.....	80 N. Y. 622..... 905
Hart v. Wall.....	2 C. P. Div. 146..... 441
Hartshorn v. Metropolitan Life Ins. Co.	55 App. Div. 471..... 847
Harty v. N. Y. & Queens Co. R. Co....	95 App. Div. 119..... 335
Hassen v. Nassau Electric R. R. Co....	34 App. Div. 72..... 335
Hatch v. N. Y. C. & H. R. R. R. Co....	{ 101 App. Div. 611, affg. 42 Misc. Rep. 152..... 829
Hatcher v. Rocheleau.....	18 N. Y. 86..... 846
Hauptner v. White.....	81 App. Div. 153, 157..... 483, 485
Heath v. Hewitt.....	127 N. Y. 171..... 660
Heine v. Rohner.....	29 App. Div. 242..... 676, 678
Henry v. Root.....	33 N. Y. 526..... 644
Herring v. Hoppock.....	15 N. Y. 411..... 100
Hickey v. Taaffe.....	105 N. Y. 26..... 736
Higgins v. Tefft.....	4 App. Div. 62..... 225
Hill v. S. B. & N. Y. R. R. Co.....	73 N. Y. 351..... 409
Hillen v. Iselin.....	144 N. Y. 374..... 85
Hinckley v. N. Y. C. & H. R. R. R. Co.	56 N. Y. 429..... 409
Holden v. Metropolitan Life Ins. Co....	165 N. Y. 18..... 519
Holliday v. Lewis.....	14 Hun, 480..... 453
Horton v. Hall & Clark Mfg. Co.....	94 App. Div. 404..... 105
House v. Jackson.....	50 N. Y. 161..... 661
House v. McCormick.....	57 N. Y. 310..... 661
Howard v. Doolittle.....	3 Duer, 464..... 459
Howell v. People.....	{ 5 Hun, 620; affd., sub. nom. Peo- ple v. Howell, 69 N. Y. 607.... 329
Huerstel v. Lorillard.....	6 Robt. 260, 262; 7 id. 251, 267... 112
Hull v. Littauer.....	162 N. Y. 569, 572..... 450
Hun v. Cary.....	59 How. Pr. 430..... 229
Hurd v. N. Y. & C. Steam Laundry Co.	167 N. Y. 89..... 194
Hurd v. Wing.....	76 App. Div. 506, 508..... 752
Hutchinson v. Simpson.....	92 App. Div. 382..... 922
Hutson v. City of New York.....	9 N. Y. 162, 163..... 331

		PAGE.
Huttemeier v. Albro. ....	18 N. Y. 48.....	563
Hynes v. McDermott .....	91 N. Y. 451.....	576

## I.

Irving National Bank v. Moynihan. ...	78 App. Div. 141.....	540
Isaacs v. New York Plaster Works ...	67 N. Y. 124....	444

## J.

Jackson v. Boneham.....	15 Johns. 226. ....	846
Jackson v. Carpenter.....	11 Johns. 542.....	652
Jackson v. Cody.....	9 Cow. 140, 147.....	846
Jackson v. Cooley.....	8 Johns. 128, 131.....	846
Jackson v. King .....	5 Cow. 287.....	847
Jackson v. Littell .....	56 N. Y. 108.....	661
Jackson v. Miller .....	3 Cow. 57.....	719
Jacobi v. Order of Germania. ....	73 Hun, 602.....	847
Jacobus v. Diamond Soda Water Mfg. Co. ....	94 App. Div. 366.....	194
Jameson v. Hartford Fire Ins. Co. ....	14 App. Div. 880.....	195
Jenkins v. Brooklyn Heights R. R. Co. ....	29 App. Div. 8 .....	46
Johnson v. City of Poughkeepsie.....	29 App. Div. 16....	839
Johnson v. New York & Pennsylvania Telephone & Telegraph Co. ....	76 App. Div. 564....	704
Jones v. N. Y. C. & H. R. R. R. Co. . . .	28 Hun, 364; affd., 92 N. Y. 628... 906	906
Juillard v. Chaffee.....	92 N. Y. 529, 535.....	308

## K.

Kain v. Larkin. ....	131 N. Y. 300.....	368, 370
Kansas Investment Co. v. Carter. ....	160 Mass. 421 .....	458
Kavanagh v. Wilson .....	70 N. Y. 177.....	450
Kavanaugh v. Commonwealth Trust Co. ....	181 N. Y. 121; 103 App. Div. 95..	697
Keegan v. Smith. ....	60 App. Div. 168.....	283
Keen v. Coleman.....	39 Penn. St. 299.....	652
Kellam v. McKenstry .....	6 Hun, 381; affd., 69 N. Y. 264 ..	826
Kelly v. Ashforth.....	47 Misc. Rep. 498 .....	922
Kemp v. New York Produce Exchange. ....	34 App. Div. 175.....	662, 665
Kent v. West.....	33 App. Div. 112.....	316
Keteltas v. Keteltas....	72 N. Y. 312....	667
Kieley v. Barron & Cooke H. & P. Co. ....	87 App. Div. 317 .....	701
Kimball v. Lester.....	43 App. Div. 27; affd., 167 N. Y. 570.....	92
King v. Sun Printing & Pub. Assn. ....	84 App. Div. 310; affd., 179 N. Y. 600.....	442
Kitching v. Brown.....	180 N. Y. 414 .....	481
Kittredge v. Folsom.....	8 N. H. 98 .....	462
Klein v. Long.....	27 App. Div. 158.....	881



# TABLE OF CASES CITED.

xxxi

		PAGE.
Kleiner v. Third Ave. R. R. Co. ....	162 N. Y. 198 .....	340, 550
Knox v. Eden Musee Co. ....	148 N. Y. 441 .....	74
Knupfle v. Knickerbocker Ice Co. ....	84 N. Y. 488 .....	408
Kohler's Estate .....	199 Penn. St. 455 .....	662
Koszlowski v. American Locomotive Co.	96 App. Div. 40, 44 .....	883
Kountze v. Kennedy .....	147 N. Y. 124 .....	576
Kramer v. Cook .....	7 Gray, 550. ....	459
Krone v. Klotz .....	8 App. Div. 587 .....	80
Krug v. Pitass .....	162 N. Y. 160 .....	271, 272

## L.

Lahey v. Lahey. ....	174 N. Y. 146 .....	92
Laidlaw v. Sage .....	158 N. Y. 99, 100 .....	180
Landau v. City of New York .....	180 N. Y. 48 .....	840
Langdon v. Mayor, etc., of City of N. Y.	93 N. Y. 145 .....	800
Larow v. N. Y., L. E. & W. R. R. Co..	61 Hun, 11 .....	888
Lawrence v. Fox .....	20 N. Y. 268 .....	751, 752
Le Roy v. Mayor, etc., of N. Y .....	20 Johns. 439 .....	759
Leary v. Lehigh Valley R. R. Co. ....	76 Hun, 575. ....	621
Leland v. Cameron .....	81 N. Y. 115 .....	425
Lent v. Shear .....	160 N. Y. 462 .....	369
Leonard v. Morris .....	9 Paige, 90 .....	477
Lewis v. Boardman .....	78 App. Div. 894 .....	870
Linsly v. Bogert .....	{ 87 Hun, 137; 67 N. Y. St. Repr. 653, 654; affd., 152 N. Y. 646 ..	898
Littlejohn v. Shaw .....	159 N. Y. 188, 198 .....	484
Livingston v. Arnoux .....	56 N. Y. 507 .....	425
Livingston v. Bishop .....	1 Johns. 290. ....	841
Long v. N. Y. C. R. R. Co. ....	50 N. Y. 76. ....	409
Lowell v. Daniels .....	2 Gray, 161. ....	651
Lowery v. Erskine .....	113 N. Y. 52, 55 .....	423, 431, 453
Lowry v. Farmers' Loan & Trust Co ..	172 N. Y. 137 .....	892, 894
Luce v. Dunham .....	69 N. Y. 39 .....	667
Luce v. Hinds .....	1 Clarke Ch. 453 .....	477
Lundbeck v. City of Brooklyn .....	26 App. Div. 595 .....	22
Lyman v. McGreivey .....	25 App. Div. 68 .....	84
Lynch v. Mayor .....	76 N. Y. 60 .....	365

## M.

MacDonald v. Sun Printing & Pub. Assn. (No. 2) .....	{ 111 App. Div. 465 .....	472
MacGreal v. Taylor .....	167 U. S. 688, 697 .....	651
Mack v. Anderson .....	165 N. Y. 529 ..	18
Magee v. City of Brooklyn .....	18 App. Div. 22 .....	366
Maghee v. Camden & Amboy R. R. Co.	45 N. Y. 514 .....	410
Magnin v. Dinsmore .....	70 N. Y. 410 .....	373
Mahaney v. Mutual Reserve Assn. ....	69 Hun, 12, 16. ....	846

	PAGE.
Mairs v. Manhattan Real Estate Association.....	89 N. Y. 498, 505. .... 740
Makel v. Hancock Mutual Life Ins. Co. ....	95 App. Div. 241..... 888
Mandeville v. Guernsey. ....	51 Barb. 99..... 634
Manice v. Manice.....	43 N. Y. 303..... 600
Mann v. Executors of Mann.....	1 Johns. Ch. 231..... 463
Manning v. Genesee River Steamboat Co. ....	66 App. Div. 314..... 622
Markham v. Jaudon.....	41 N. Y. 235..... 556
Markham v. Stevenson Brewing Co....	104 App. Div. 420..... 179
Marquat v. Marquat.....	12 N. Y. 336..... 11
Martin v. City of New York.....	176 N. Y. 371..... 162
Massoth v. D. & H. C. Co.....	64 N. Y. 534..... 886
Matter of Bartholomew.....	106 App. Div. 371 ..... 320
Matter of Board of Street Opening, etc..	111 N. Y. 581..... 289
Matter of Brandreth.....	{ 28 Misc. Rep. 468; affd., 169 N. Y. 437..... 430, 433, 434
Matter of Burns.....	155 N. Y. 23..... 692
Matter of Canal & Walker Streets.....	12 N. Y. 406..... 290
Matter of Clark v. Hyland. ....	88 App. Div. 393..... 87
Matter of Commissioners of Central Park.	50 N. Y. 493..... 288, 289
Matter of Crouch.....	41 Misc. Rep. 349... .. 30
Matter of Cullinan (Maher Certificate)..	109 App. Div. 816 ..... 864
Matter of Denton.....	137 N. Y. 428..... 597
Matter of Denton v. Sanford.....	108 N. Y. 607..... 858
Matter of Department of Public Parks..	85 N. Y. 459 ..... 289
Matter of Dows.....	167 N. Y. 227, 231. .... 825
Matter of Embury.....	{ 19 App. Div. 214; affd., 154 N. Y. 746..... 153
Matter of Fitzsimons.....	174 N. Y. 15, 28..... 29, 425
Matter of Ford.....	92 App. Div. 119... .. 263
Matter of Greene.....	166 N. Y. 493..... 820
Matter of Haight ..	51 App. Div. 310..... 756
Matter of Hall v. Irvin.....	78 App. Div. 107..... 563
Matter of Hart v. Tuite.....	75 App. Div. 323, 324..... 869
Matter of Hodgman. ....	11 App. Div. 344..... 858
Matter of Houdayer.....	150 N. Y. 41..... 157
Matter of Hoyt .....	160 N. Y. 607..... 780
Matter of Irvin .....	63 App. Div. 158 ..... 177
Matter of Johnson.....	{ 57 App. Div. 494; 170 N. Y. 139. 898 899
Matter of Jones. ....	4 Sandf. Ch. 616..... 461
Matter of Jones.....	51 App. Div. 420..... 177
Matter of Judson .....	{ (Not reported); affd., 73 App. Div. 620..... 234
Matter of Kernochan.....	104 N. Y. 618..... 889, 895
Matter of King..	168 N. Y. 53..... 29
Matter of Kingsbridge Road.....	4 Hun, 599; affd., 62 N. Y. 645.. 290

# TABLE OF CASES CITED.

xxxiii

	PAGE.
Matter of Knapp.....	85 N. Y. 284..... 80
Matter of Lansing.....	183 N. Y. 238, 244..... 325
Matter of Mason .....	98 N. Y. 527, 536..... 462
Matter of McGrelvey....	{ 87 App. Div. 66; affd., 161 N. Y. 645..... 84
Matter of Meyer.....	{ 98 App. Div. 7; affd., 181 N. Y. 558..... 177, 178
Matter of Mullan.....	145 N. Y. 98, 104..... 427
Matter of New York, Lackawanna & Western R. Co.....	{ 105 N. Y. 89..... 596
Matter of New York & L. I. Bridge Co. {	90 Hun, 812, 826; 148 N. Y. 540, 555..... 778
Matter of Nolan.....	70 Hun, 586..... 815
Matter of Notman.....	108 App. Div. 520..... 899
Matter of Otis.....	101 N. Y. 580, 585..... 816
Matter of Phipps.....	77 Hun, 825; affd., 143 N. Y. 641.. 156
Matter of Regan.....	167 N. Y. 338..... 28
Matter of Rogers.....	10 App. Div. 593..... 461
Matter of Rogers .....	{ 22 App. Div. 428; 161 N. Y. 108.. 779 780, 891, 895
Matter of Salisbury.....	3 Johns. Ch. 847..... 817
Matter of Smith.....	71 App. Div. 605..... 283
Matter of Steglich.....	91 App. Div. 75..... 641
Matter of Steinway.....	159 N. Y. 263..... 186
Matter of Stevens.....	46 Misc. Rep. 623..... 780
Matter of Strong.....	90 App. Div. 607..... 282
Matter of Swift.....	137 N. Y. 77, 85..... 325
Matter of Thorne.....	155 N. Y. 140..... 666
Matter of Tilden.....	98 N. Y. 434..... 858
Matter of Van Slooten v. Wheeler ....	140 N. Y. 624..... 869
Matter of Van Steenburgh.....	24 Misc. Rep. 1..... 84
Matter of Venable.....	104 App. Div. 531..... 509
Matter of Wagner.....	119 N. Y. 28..... 858
Matter of Webster .....	106 App. Div. 360..... 847
Matter of Whitehead .....	88 App. Div. 319..... 38
Matter of Wood.....	107 App. Div. 514..... 781
Matter of Zeffta, Countess de Rohan- Chabot.....	{ 167 N. Y. 290 ..... 156, 157
Matthews v. Coe .....	49 N. Y. 57..... 555
Maximilian v. Mayor.....	62 N. Y. 160..... 906
Mayor, etc., v. Tenth National Bank...	111 N. Y. 446..... 820
Mayor, etc., of City of New York v. Furze.....	{ 3 Hill, 612..... 366
McAlpine v. Potter.....	126 N. Y. 285, 290.. 462, 463, 897, 900
McCarthy v. City of Syracuse.....	46 N. Y. 194..... 366

	PAGE.
McCarty v. City of Lockport.....	13 App. Div. 494..... 299
McGillis v. McGillis.....	11 App. Div. 359; 154 N. Y. 532. 663
McHenry v. Jewett.....	90 N. Y. 58..... 676, 678
McIntosh v. Ensign.....	28 N. Y. 169..... 11
McKee v. Lamon.....	159 U. S. 317, 322. .... 456
McKenna v. People.. ..	81 N. Y. 360 ..... 328
McKinney v. Grand St., etc., R. R. Co..	104 N. Y. 352..... 515, 518, 520
McLouth v. Hunt.....	154 N. Y. 179. . . . 780, 890, 895, 899
McMahon v. New York News Pub. Co..	51 App. Div. 488..... 271
McMillan v. Klaw & Erlanger Co.....	107 App. Div. 407..... 684, 685
McMorris v. Simpson.....	21 Wend. 610 ..... 328
McNeil v. Tenth National Bank.....	46 N. Y. 325... .. 73, 74
McVeany v. Mayor, etc., of N. Y.....	80 N. Y. 185..... 162
Mead v. Maben.. ..	131 N. Y. 255. .... 597
Meas v. Johnson .....	185 Penn. St. 12..... 467
Melen v. Andrews .....	M. & M. 336..... 344
Melville v. Kruse.....	174 N. Y. 306..... 643
Menzies v. Interstate Paving Co.. ..	106 App. Div. 107..... 355
Merritt v. Village of Portchester.....	71 N. Y. 313..... 785
Mesinger v. Mesinger Bicycle Saddle Co.	44 App. Div. 26..... 751
Miles v. King.....	18 App. Div. 41..... 334
Miller v. County of Nassau.....	80 App. Div. 641..... 916
Mills v. Bliss.. ..	55 N. Y. 139..... 277
Mills v. City of Brooklyn.....	32 N. Y. 489..... 365
Mills v. Smith.....	141 N. Y. 256..... 857
Mills v. Thomas Elevator Co.....	{ 54 App. Div. 124; <i>affd.</i> , 172 N. Y. 660..... 586
Mills v. Weir.....	82 App. Div. 396... .. 409
Minchin v. Merrill.....	2 Edw. Ch. 333, 338..... 455
Ming v. Corbin.. ..	142 N. Y. 334, 340 et seq..... 443
Minor v. Erie R. R. Co.....	171 N. Y. 573..... 46
Mission of the Immaculate Virgin v. Cronin.....	{ 143 N. Y. 524..... 827
Mitchell v. N. Y., L. E. & W. R. R. Co.	36 Hun, 177... .. 740
Moffatt v. Fulton. ....	132 N. Y. 507..... 615
Moffett Co. v. City of Rochester.....	82 Fed. Rep. 255; 178 U. S. 373.. 374
Moffitt v. Hereford.....	132 Mo. 513..... 435
Monteath v. Monteath.....	51 Ill. App. 126..... 448
Mooney v. Byrne.. ..	163 N. Y. 86, 92..... 352
Moore v. Francis... ..	121 N. Y. 199, 204..... 467
Moore v. Littel.....	41 N. Y. 66..... 661
Morris v. Brown.....	111 N. Y. 318. .... 589
Morris v. N. Y., O. & W. R. Co.....	148 N. Y. 88..... 515, 519
Morrison v. Smith.....	{ 83 App. Div. 206, 209; 177 N. Y. 366 ..... 440
Moskowitz v. Brooklyn Heights R. R. Co.....	{ 89 App. Div. 425; <i>affd.</i> , 183 N. Y. 521..... 406

# TABLE OF CASES CITED.

xxxv

	PAGE.
Mott v. Eno.....	181 N. Y. 365..... 290
Mowbray v. Levy.....	85 App. Div. 68..... 360, 361
Muhlker v. Harlem Railroad Co.....	197 U. S. 544..... 167-169, 274, 275
Mullady v. Brooklyn Heights R. R. Co.	65 App. Div. 549..... 551
Mullarky v. Sullivan.....	136 N. Y. 227..... 597
Munson v. S., G. & C. R. R. Co....	108 N. Y. 73..... 227
Murdock v. Ward.....	67 N. Y. 389..... 667
Murphy v. Holmes.....	87 App. Div. 366..... 651
Mutual Life Ins. Co. v. Balch.....	4 Abb. N. C. 202..... 62
Mutual Life Ins. Co. v. Shipman.....	119 N. Y. 324..... 18, 15
Mutual Life Ins. Co. v. Yates County Nat. Bank.....	85 App. Div. 218..... 641

## N.

National Bank of Ballston Spa v. Board of Supervisors.....	106 N. Y. 488..... 294
Nemetty v. Naylor.....	100 N. Y. 562..... 265
New Union Telephone Co. v. Marsh....	96 App. Div. 123..... 704
New York Life Ins. Co. v. Casey.....	81 App. Div. 92..... 881
New York Life Ins. & Trust Co. v. Baker.	165 N. Y. 484..... 780
Nichols v. City of New Rochelle.....	105 App. Div. 77..... 921
Niles v. N. Y. C. & H. R. R. R. Co....	176 N. Y. 119..... 697
Nolte v. Herter.....	65 Ill. App. 480..... 466
Noonan v. City of Albany.....	79 N. Y. 470..... 740
Norris v. Beyea.....	18 N. Y. 278..... 595
North Hempstead v. Hempstead.....	2 Wend. 112..... 790
Norton v. U. S. Wood Preserving Co....	89 App. Div. 287, 241..... 4
Nunnally v. Tribune Assn.....	111 App. Div. 485..... 483

## O.

O'Reilly v. Brooklyn Heights R. R. Co. {	95 App. Div. 261; affd., 179 N. Y. 450..... 46
O'Reilly v. City of Kingston.....	114 N. Y. 439, 448..... 759
Ogley v. Miles.....	139 N. Y. 458..... 733, 734
Ohio & Mississippi Ry. Co. v. Simms...	43 Ill. App. 260..... 811
Oishei v. Metropolitan Street R. Co. { (No. 1).....	110 App. Div. 709..... 912, 913
Olmsted v. Keyes.....	85 N. Y. 593..... 502
Orcutt v. Rickerbrodt.....	42 App. Div. 238..... 788
Ormsby v. Vermont Copper Mining Co.	56 N. Y. 623..... 556
Osterhoudt v. Board of Supervisors of the County of Ulster.....	98 N. Y. 243..... 813
Oxley v. Lane.....	35 N. Y. 340..... 596

## P.

Page v. Krekey.....	137 N. Y. 312..... 576
Paget v. Melcher.....	26 App. Div. 17; 156 N. Y. 404... 661

	PAGE.
Palmer v. Larchmont Electric Co.....	158 N. Y. 231..... 704
Palmer v. N. Y. News Publishing Co...	31 App. Div. 212..... 841
Parfitt v. Ferguson .....	3 App. Div. 176..... 453
Park v. N. Y. C. & H. R. R. R. Co....	155 N. Y. 215..... 486, 487
Parker v. Conner.....	93 N. Y. 119..... 850
Parker v. Jackson.....	16 Barb. 38..... 11
Parmenter v. Fitzpatrick .....	135 N. Y. 190..... 556, 557
Parsons v. Sutton.....	66 N. Y. 92..... 556
Peace v. McAdoo.....	110 App. Div. 13..... 919
Pearsall v. Great Northern Railway....	161 U. S. 646..... 48
Peck v. Knox.....	{ 1 Sweeny (N. Y. Super. Ct.), 311 .. 877, 878
People v. Ballard.....	134 N. Y. 269; 136 id. 639..... 194
People ex rel. Schuylerville & U. H. R. R. Co. v. Betts.....	{ 55 N. Y. 600..... 760
People ex rel. Emerick v. Board of Fire Comrs. of N. Y. ....	{ 86 N. Y. 149..... 745, 747
People ex rel. Burroughs v. Brinkerhoff.	68 N. Y. 265..... 201
People v. Casey.....	72 N. Y. 398 .. 377
People ex rel. Knickerbocker Fire Ins. Co. v. Coleman.....	{ 107 N. Y. 541, 543, 544.. 429, 432
People ex rel. Commissioner of High- ways v. Connor.....	{ 46 Barb. 333..... 782, 785
People v. Crapo.....	76 N. Y. 291..... 493
People v. Danlhy.....	63 Hun, 579..... 560
People v. Dorthy.....	156 N. Y. 287..... 377
People ex rel. Elder v. Elder.....	98 App. Div. 244..... 473
People v. Empire Mutual Life Ins. Co..	92 N. Y. 105..... 195
People v. Everhardt.....	104 N. Y. 591..... 603, 609-611
People ex rel. McAleer v. French.....	119 N. Y. 503, 507 .. 379
People v. Gardner.....	144 N. Y. 119, 131..... 603
People v. Giblin.....	115 N. Y. 199. .... 377
People v. Graves.. ..	5 Park. Cr. Rep. 184..... 560
People ex rel. Cross v. Greene. ....	98 App. Div. 620..... 161
People ex rel. Grant v. Greene.....	98 App. Div. 608..... 161
People ex rel. Allen v. Hagen.....	170 N. Y. 46, 49, 50..... 320, 321
People v. Herlihy. ....	{ 66 App. Div. 534; affd., 170 N. Y. 584..... 561
People ex rel. Corscadden v. Howe....	177 N. Y. 499, 504..... 201
People v. Irving.....	95 N. Y. 541..... 377
People v. Johnson.....	110 N. Y. 134..... 321
People ex rel. Cuming v. Koch....	{ 2 N. Y. St. Repr. 110; affd., 103 N. Y. 650..... 745
People ex rel. Wood v. Lacombe.....	99 N. Y. 43, 49..... 690
People v. Loomis. ....	178 N. Y. 400..... 499
People ex rel. Press Pub. Co. v. Martin.	142 N. Y. 228..... 396
People ex rel. Albertson v. McAdoo....	46 Misc. Rep. 517..... 161

# TABLE OF CASES CITED.

xxxvii

	PAGE.
People ex rel. Corkhill v. McAdoo.....	98 App. Div. 812..... 743
People ex rel. Evans v. McEwen.....	67 How. Pr. 105, 112, 113..... 322
People v. McLaughlin.....	150 N. Y. 365..... 560
People ex rel. Cramer v. Medberry.....	17 Misc. Rep. 8. .... 34
People v. Molineux.....	168 N. Y. 264, 305..... 498, 608
People ex rel. Rothschild v. Muh.....	101 App. Div. 423..... 760
People ex rel. Einsfeld v. Murray... ..	149 N. Y. 367..... 35
People v. Noelke.....	94 N. Y. 187..... 377
People ex rel. Scott v. Pitt.....	169 N. Y. 521..... 759
People ex rel. Bidwell v. Pitts.....	111 App. Div. 319..... 322, 912
People v. Reavey.....	38 Hun, 424..... 377
People ex rel. Clarke v. Roosevelt.....	168 N. Y. 488, 489..... 377-379
People ex rel. Underhill v. Saxton.....	{ 15 App. Div. 263, 269; aff'd., 154 N. Y. 748..... 793
People ex rel. Gleason v. Scannell.....	69 App. Div. 401..... 423
People ex rel. Stephens v. See....	29 Hun, 216..... 783
People v. Shulman .....	80 N. Y. 373, 376..... 603
People ex rel. Sullivan v. Sloan.....	39 App. Div. 265..... 321
People ex rel. Haines v. Smith.....	45 N. Y. 772, 779..... 846
People v. Snyder.....	41 N. Y. 397, 403..... 846
People v. Weaver.....	177 N. Y. 434..... 603, 604, 610
People v. Webster.....	139 N. Y. 73..... 377
People v. Weldon.....	111 N. Y. 569..... 561
People ex rel. American Contracting & } Dredging Co. v. Wemple.....	{ 60 Hun, 225..... 783
People v. Werbin.....	27 Hun, 311 ..... 559
People ex rel. Miller v. Wurster.....	149 N. Y. 549..... 396
People v. Zucker.....	{ 20 App. Div. 363; aff'd., 154 N. Y. 770..... 498
Pharis v. Gere.....	110 N. Y. 336, 347 ..... 816
Phipard v. Phipard.....	55 Hun, 436... .. 453
Phoenix v. Livingston... ..	101 N. Y. 451, 456..... 462, 896, 900
Pitt v. Davison.....	37 Barb. 97..... 338
Platt v. Elias.....	101 App. Div. 518..... 702
Pocantico Water Works Co. v. Bird....	130 N. Y. 249, 258 et seq..... 692
Pond v. New Rochelle Water Co.....	183 N. Y. 330, 336..... 752, 753
Pope v. Farnsworth .....	146 Mass. 339..... 858
Posthoff v. Bauendahl.....	43 Hun, 570. .... 100
Powell v. Tuttle.. ..	3 N. Y. 396..... 636
Prairie St. Nat. Bank v. United States..	164 U. S. 227..... 881
Press Company v. Stewart.....	119 Penn. St. 584, 603..... 440
Providence Retreat v. City of Buffalo..	29 App. Div. 160..... 628, 636

## Q.

Quill v. Mayor.....	36 App. Div. 476..... 906
Quirk v. Siegel-Cooper Co. ....	43 App. Div. 464..... 551

	R.	PAGE.
Raby v. Ridehalgh.....	7 DeG., M. & G. 104.....	857
Radjaviller v. Third Ave. R. R. Co....	58 App. Div. 11.....	551
Randall v. Kreiger.....	23 Wall. 137.....	663
Read v. Hurd.....	7 Wend. 408.....	323
Redfield v. Redfield.....	110 N. Y. 671.....	78
Reed v. Hayward.....	82 App. Div. 417.....	615
Rehberg v. Mayor, etc., of City of New York.....	91 N. Y. 137.....	839
Reich v. Cochran.....	151 N. Y. 122.....	265
Reichert v. Stilwell.....	172 N. Y. 88, 89.....	479
Richards v. Hartshorne.....	110 App. Div. 650.....	664
Riddle v. Littlefield.....	53 N. H. 508.....	563
Rinn v. El. Power Co.....	3 App. Div. 305.....	360
Rix v. Hunt.....	16 App. Div. 540.....	503
Rixa v. Rixa.....	35 Misc. Rep. 227... ..	251
Robbins v. Ferris.....	5 Hun, 286.. ..	862
Roberge v. Winne.....	144 N. Y. 709.....	881
Robert v. Corning.....	89 N. Y. 225.....	595
Robinson v. Carpenter.....	77 App. Div. 520.....	869
Rockefeller v. Lamora.....	106 App. Div. 345.....	852
Roe v. Strong.....	107 N. Y. 358.....	790
Rose v. Oliver.....	2 Johns. 365.....	100
Roseboom v. Billington.....	17 Johns. 187.. ..	328
Rundell v. Butler.....	7 Barb. 260.....	472
Russell v. Allerton.....	108 N. Y. 288.....	106
Russell v. McCall.....	141 N. Y. 437.....	841
Rutgers v. Lucet.....	2 Johns. Cas. 92, 95.....	456
Ryan v. Third Avenue R. R. Co.....	92 App. Div. 306.....	257
S.		
Sage v. Culver.....	147 N. Y. 241, 246.....	698
Salt Springs Nat. Bank v. Wheeler....	48 N. Y. 492.....	878
Samuels v. Evening Mail Association...	9 Hun, 288; revd., 75 N. Y. 604..	269
Sander v. State of New York.....	182 N. Y. 400.....	187, 274
Sanderson v. Caldwell.....	45 N. Y. 398.....	472
Sandman v. Seaman.....	84 Hun, 337; affd., 156 N. Y. 668.	850
Saranac & L. P. R. R. Co. v. Arnold....	167 N. Y. 368, 373, 374.. ..	450, 451
Saunders v. N. Y. C. & H. R. R. R. Co.	144 N. Y. 75, 85.....	772
Saxton v. New York Elevated R. R. Co.	139 N. Y. 320.....	313, 314
Schafer v. Mayor.....	154 N. Y. 466, 472.....	905, 906
Schlotterer v. Brooklyn & New York Ferry Co.....	89 App. Div. 508.....	519
Schuyler v. Smith.....	51 N. Y. 309.....	363
Schwander v. Birge.....	46 Hun, 66 .. ..	484
Scofield v. Doscher.....	72 N. Y. 491.....	477



# TABLE OF CASES CITED.

xxxix

PAGE.

Sealey v. Met. St. R. Co. ....	78 App. Div. 530.....	340
Segelken v. Meyer.....	94 N. Y. 484.....	615
Seifert v. City of Brooklyn....	101 N. Y. 136.....	366
Shaffer v. Bacon.....	{ 35 App. Div. 248; affd., 161 N. Y. 635.....	30
Shangle v. Hallock.....	6 App. Div. 55.....	600
Shannon v. Burr .....	1 Hilt. 40.....	677
Sharman v. Jackson.....	98 App. Div. 187.....	668
Sheeron v. Coney Island & Brooklyn R. R. Co.....	{ 78 App. Div. 476.....	335
Shepard v. Parker.....	36 N. Y. 517 .....	377
Sherman v. D., L. & W. R. R. Co.....	106 N. Y. 542.....	398
Sherwood v. Seaman.....	2 Bosw. 127.....	459
Shirk v. Brookfield.....	77 App. Div. 295.....	361
Shocmaker v. Benedict.....	11 N. Y. 176.....	18
Sibley v. Sibley.....	76 App. Div. 132.....	182
Simpkins v. Low.....	54 N. Y. 179, 185.....	433
Sims v. Everhardt.....	102 U. S. 300, 313.....	645, 651
Sisco v. L. & H. R. R. Co.....	145 N. Y. 296.....	621
Sistare v. Olcott.....	15 N. Y. St. Repr. 248.....	435
Sixth Avenue R. R. Co. v. Metropolitan Elevated R. Co.....	{ 138 N. Y. 548.....	313
Skinner v. Smith.....	184 N. Y. 240.....	194
Sloan v. National Surety Co. ....	74 App. Div. 417.....	96
Smadbeck v. Law.....	106 App. Div. 552.....	239
Smith v. Allen.....	161 N. Y. 482.....	666
Smith v. Mackin.....	4 Lans. 41.....	874
Smith v. Mayor.....	66 N. Y. 295.....	366
Smith v. Reid.....	134 N. Y. 568, 569, 576..	370, 850, 851
Smith v. Stewart.....	41 Minn. 7.....	466
Smith v. Wetmore.....	167 N. Y. 234.....	881
Snow v. Fitchburg Railroad Company..	136 Mass. 552.....	811
Southwick v. First National Bank of Memphis.....	{ 84 N. Y. 420.....	374
Spaulding v. American Wood Board Co.	58 App. Div. 814.....	719
Speir v. City of Brooklyn.....	139 N. Y. 6.....	840
Spence v. Ham .....	163 N. Y. 220.....	4
Spencer v. Spencer.....	38 App. Div. 408.....	756
Sperb v. Metropolitan Elevated R. Co..	137 N. Y. 596.....	313
Spotten v. Keeler.....	22 Abb. N. C. 105.....	846
Sproule v. Bouch.....	L. R. 29 Ch. Div. 635.....	890
St. Regis Paper Co. v. Santa Clara Co..	{ 55 App. Div. 225; 62 id. 538, 540; 34 Misc. Rep. 428; 66 App. Div. 617; revd., 173 N. Y. 149 .....	279
Standard Trust Co. v. N. Y. C. & H. R. R. R. Co.....	{ 178 N. Y. 407....	22, 386
Starin v. Kelly.....	88 N. Y. 418.....	363, 369

	PAGE.
State v. Dufour.....	63 Ind. 567. .... 560
Stebbins v. Duncan.....	108 U. S. 82, 47. .... 846
Stedeker v. Bernard.....	102 N. Y. 327..... 10
Steeffel v. Rothschild.....	179 N. Y. 273, 279 et seq..... 459
Steele v. Benham.....	84 N. Y. 634..... 97
Steinbach v. Prudential Ins. Co.....	172 N. Y. 476..... 813
Sterger v. Van Sicklen.....	132 N. Y. 499..... 403
Sterling v. Chapin.....	102 App. Div. 589..... 912
Stewart v. Phelps.....	{ 71 App. Div. 91; affd., 173 N. Y. 621..... 778
Stoddard v. Denison.....	38 How. Pr. 296..... 99
Stringham v. Hilton.....	111 N. Y. 198..... 620
Stringham v. Stewart.....	100 N. Y. 516..... 588
Stuyvesant v. Neil.....	67 How. Pr. 16..... 86
Stuyvesant v. Weil.....	{ 41 App. Div. 551; revd., 167 N. Y. 421..... 582-584
Sullivan v. Sullivan.....	161 N. Y. 554, 557. .... 753
Suydam v. Bartle.....	9 Paige, 294..... 477
Sweeney v. Berlin & Jones Envelope Co.	101 N. Y. 520. .... 257
Sweeney v. Sturgis.....	24 Hun, 162..... 815
Sweeny v. City of New York.....	173 N. Y. 416..... 180
Sweet v. City of Syracuse.....	129 N. Y. 817, 884..... 772

## T.

Tanenbaum v. Federal Match Co. (No. 2).	102 App. Div. 524..... 417
Taylor v. Kelly.....	5 Hun, 115..... 453
Taylor v. Wallace.....	31 Misc. Rep. 393..... 383
Tenoza v. Pelham Hod Elevating Co...	50 App. Div. 581..... 315
Terhune v. Mayor, etc., of N. Y.....	88 N. Y. 247..... 162
Terriberry v. Mathot.....	110 App. Div. 370..... 236
Theobald v. Smith.....	108 App. Div. 200..... 665, 667
Thomas v. Rumsey.....	6 Johns. 26..... 841
Thomson v. Poor.....	147 N. Y. 408..... 881
Tillman v. Davis.....	95 N. Y. 24..... 667
Tilson v. Terwilliger.....	56 N. Y. 273..... 369
Tipton v. Feitner.....	20 N. Y. 423..... 443
Tobin v. Bell.....	73 App. Div. 41..... 627
Tolman v. Syracuse, Binghamton & N. Y. R. R. Co.....	{ 98 N. Y. 198, 203..... 905, 906
Town of Green Island v. Williams.....	79 App. Div. 263..... 615
Tracy v. Frey.....	95 App. Div. 579..... 578
Trebilcox v. McAlpine.....	46 Hun, 469, 473..... 846
Triggs v. Sun Printing & Pub. Assn....	{ 179 N. Y. 144, 154, 155..... 441, 442 467, 472
Tucker v. Moreland.....	10 Pet. 58, 75. .... 653
Tyson v. Blake.....	22 N. Y. 558..... 596

# TABLE OF CASES CITED.

xli

## U.

PAGE.

Uhlman v. New York Life Ins. Co.....	109 N. Y. 429.....	186
Uhlmann v. Uhlmann . . . . .	17 Abb. N. C. 236, 260 . . . . .	448
United States v. Northern Securities Co. {	120 Fed. Rep. 721; 198 U. S. 328.	48 49

## V.

Vail v. Reynolds.....	118 N. Y. 297.....	305
Vail v. Rice . . . . .	5 N. Y. 155.....	444
Van Brunt v. Town of Flatbush . . . . .	128 N. Y. 50, 54.....	201
Van Dewater v. Gear.....	21 App. Div. 201.....	100
Van Wycklen v. City of Brooklyn . . . . .	118 N. Y. 424, 429.....	483
Vanderbilt v. Schreyer.....	91 N. Y. 392.....	477, 478
Vanderzee v. Slingerland.....	103 N. Y. 47.....	524, 596
Vial v. Jackson.....	78 App. Div. 355..	315
Village of Carthage v. Central N. Y. Tel. Co. . . . .	{ 110 App. Div. 625.....	704
Vincent v. City of Brooklyn.....	31 Hun, 122.....	352
von Der Born v. Schultz.....	104 App. Div. 94.....	266
Voorhees v. Burchard.....	55 N. Y. 98.....	563
Vrooman v. Turner.....	69 N. Y. 280.....	752

## W.

Walker v. Newton Falls Paper Co.....	99 App. Div. 47.....	20
Waller v. State . . . . .	144 N. Y. 579, 599.....	772
Walters v. Fuller Co. . . . .	74 App. Div. 388, 393.....	144
Wamaley v. Atlas Steamship Co.....	168 N. Y. 533, 540.....	877, 878
Warner v. Press Publishing Co.....	132 N. Y. 181.....	272
Weber v. Wallerstein. (No. 1).....	111 App. Div. 693.....	701
Weet v. Trustees of the Village of Brockport.....	{ 16 N. Y. 161.....	332
Wehle v. Butler.....	61 N. Y. 245.....	100
Weinstein v. Weber.....	58 App. Div. 112.....	15
Welle v. Celluloid Co.....	175 N. Y. 401.....	728
Wells v. Alexandre.....	180 N. Y. 642.....	106
Wells, Fargo & Co. v. W., C. & P. C. R. R. Co. . . . .	{ 12 App. Div. 49.....	862
Werner v. Rawson.....	39 Ga. 619....	874
Whistler v. Ruskiñ.....	Times for Nov. 27, 1878.....	467, 472
White v. Collins Building & Const. Co..	82 App. Div. 1..	481
White v. Gray's Sons.....	96 App. Div. 154..	768
White v. Hicks.....	33 N. Y. 383, 393.....	14
White v. Wittemann Lithographic Co..	181 N. Y. 631.....	733, 734
Wickham v. Lehigh Valley R. R. Co..	85 App. Div. 182.....	740
Williams v. Jones.....	166 N. Y. 522, 532.....	598, 597
Wilson v. Mayor, etc., of New York....	1 Den. 595 . . . . .	365
Wilson v. Mechanical Orguinette Co....	170 N. Y. 542.....	106

		PAGE.
Wood v. Swift.....	81 N. Y. 31.....	245, 251
Wood's Adm'r v. Nelson's Ex'r.....	10 B. Mon. (Ky.) 231.....	462
Woolley v. Grand St. & Newtown R. R. Co.....	83 N. Y. 121.....	22
Woolner v. Hill.....	93 N. Y. 580.....	443
Wuest v. Brooklyn Citizen.....	102 App. Div. 480. ....	440
Wylde v. Northern R. R. Co. of N. J....	53 N. Y. 156.....	835
Wyman v. Orr.....	47 App. Div. 136.....	728

## Y.

Yarwood v. Trusts & Guarantee Co., Ltd.....	94 App. Div. 47; appeal dismissed, 182 N. Y. 527.....	642
Young v. Shulenberg.....	165 N. Y. 388.....	845, 846

## UNITED STATES CONSTITUTION CITED.

	PAGE.		PAGE.
U. S. Const. art. 1, § 10, subd. 1... 168		U. S. Const. 14th amendt. § 1..	168, 169
	169, 275		275
U. S. Const. art. 4, § 1.....	859		

## NEW YORK STATE CONSTITUTION CITED.

	PAGE.		PAGE.
Const. (1846) art. 1, § 9 .....	771-773	Const. (1894) art. 5, § 9....	162, 671-674
Const. (1874) art. 8, § 11 .....	820	Const. (1894) art. 6, § 2.....	540
Const. (1894) art. 1, § 6.....	169, 691	Const. (1894) art. 6, § 3.....	541
Const. (1894) art. 3, § 16.....	200-202	Const. (1894) art. 6, § 15.....	28
Const. (1894) art. 3, § 20.....	771	Const. (1894) art. 8, § 10.....	820

## NEW YORK REVISED STATUTES CITED.

	PAGE.		PAGE.
1 R. S. 737, § 124.....	13, 14	2 R. S. 191, § 154.....	477-479
1 R. S. 751, § 1 et seq.....	660	R. S. pt. 2, chap. 1, tit. 2, § 124..	13, 14
2 R. S. 84, § 13.....	283	R. S. pt. 2, chap. 2, § 1 et seq....	660
2 R. S. 93, § 58.....	897	R. S. pt. 2, chap. 6, tit. 3, § 58....	897
2 R. S. 191, § 153.....	478, 479		

## REVISED LAWS CITED.

	PAGE.		PAGE.
R. L. 1813, chap. 86.....	168, 290	R. L. 1813, chap. 86, § 178....	288-290
R. L. 1813, chap. 86, § 177 et seq..	287		
	292		

## SESSION LAWS CITED.

	PAGE.		PAGE.
1784, chap. 21.....	790	1884, chap. 451.....	289
1796, " 69, § 9.....	798	1884, " 451, § 2.....	289
1797, " 54.....	798	1885, " 483.....	154
1796, " 50.....	83	1885, " 483, § 1.....	155, 156
1807, " 115.....	290	1887, " 708.....	658, 667
1831, " 263.....	165	1887, " 718.....	154, 155
1835, " 281.....	801	1890, " 95.....	668, 691
1837, " 274.....	166	1890, " 565, as amd ..	43, 46, 47
1841, " 257.....	574	1890, " 565, art. 4.....	44
1847, " 455.....	788	1890, " 565, § 39.....	40, 44
1850, " 140, § 21.....	691	1890, " 565, § 101.....	40, 44, 45
1854, " 270.....	290, 292	1890, " 565, § 104 (105).....	46
1854, " 270, § 1.....	290	1890, " 568, § 83.....	783, 784, 785
1862, " 18, § 99.....	758	1891, " 34.....	233, 234
1862, " 18, § 99, subd. 1.....	763	1891, " 215.....	154-156
1862, " 18, § 99, subd. 2..	758, 759	1891, " 259.....	771-773
	763	1891, " 259, § 3.....	771, 772
1862, " 18, § 99, subd. 3.....	763	1891, " 259, § 4.....	772
1862, " 18, § 107.....	758, 760	1891, " 259, § 6.....	772
1863, " 362, § 8.....	897	1891, " 381.....	519
1869, " 237.....	691	1892, " 339.....	167, 274
1872, " 9.....	820	1892, " 594.....	280
1872, " 625.....	758, 760	1892, " 629.....	863
1872, " 702.....	107, 169	1892, " 676.....	46
1873, " 335, § 28.....	744, 745	1892, " 677, § 82.....	864
1873, " 330.....	657, 658, 666-668	1892, " 685, § 12.....	818, 819
1873, " 330, § 10.....	658	1892, " 686, § 22.....	261-263
1875, " 606, § 24.....	691	1892, " 687, § 3, subd. 2.....	185
1875, " 611, § 17.....	717	1892, " 688, § 29.....	185, 186
1877, " 224.....	691	1892, " 688, § 57.....	146, 148-151
1877, " 466.....	510	1892, " 690, § 22.....	195, 196
1877, " 466, § 10.....	510	1892, " 690, § 71.....	194
1877, " 466, § 20.....	511	1893, " 466.....	818
1877, " 466, § 20, subd. 9..	511, 512	1893, " 660, § 12.....	288, 290
1878, " 299.....	527	1894, " 147.....	286, 287
1878, " 315, § 14.....	863	1894, " 147, § 3.....	287
1878, " 318.....	510, 511	1894, " 147, § 4.....	286, 287
1880, " 178.....	242	1894, " 334.....	784
1880, " 245, § 1, subd. 2, ¶ 3..	897	1894, " 437.....	758, 759, 763
1881, " 649.....	691	1894, " 448.....	864
1882, " 410.....	262	1894, " 615.....	200
1882, " 410, § 48.....	744	1894, " 722.....	691
1882, " 410, § 955.....	289	1894, " 722, § 8.....	691
1882, " 410, § 963 et seq.....	287	1894, " 722, §§ 10-13.....	691
1882, " 410, § 990.....	288, 290	1895, " 369.....	910
1884, " 381.....	260	1895, " 672.....	185

	PAGE.		PAGE.
1895, chap. 946....	190	1897, chap. 418, art. 1....	860, 861, 864
1896, " 57.....	64, 67, 68	1897, " 418, § 2.....	863
1896, " 57, § 1.....	64-66	1897, " 418, § 20.....	863
1896, " 57, § 2.....	66	1897, " 418, § 20, subd. 5..	861, 863
1896, " 112, as amd.....	34, 35	1897, " 418, § 22.....	864
1896, " 112, § 11.....	33	1897, " 612, § 160 et seq.....	920
1896, " 112, § 11, subd. 2....	32, 33	1897, " 664.....	287
1896, " 112, § 13.....	34, 35	1897, " 679.....	64-68
1896, " 112, § 23, subd. 1....	34	1897, " 688.....	40, 44, 45
1896, " 272, art. 1.....	190	1897, " 738.....	762, 763
1896, " 272, art. 6.....	659, 668	1897, " 738, § 11.....	759
1896, " 272, § 4.....	190	1897, " 738, § 11, subd. 2.759, 761-	763
1896, " 272, § 21.....	260	1897, " 738, § 11, subd. 5..	758, 760
1896, " 272, § 60.....	659, 668	1898, " 169.....	861-865
1896, " 272, § 64.....	659	1899, " 53.....	515, 519
1896, " 547, § 155.....	14	1899, " 61.....	28
1896, " 547, § 200.....	363	1899, " 192.....	20
1896, " 908, § 220, subd. 5....	324	1899, " 370.....	671-674
	325	1899, " 370, § 6.....	671, 672
1896, " 909, § 5.....	261, 262	1899, " 370, § 10.....	671
1896, " 909, § 11.....	262	1899, " 370, § 13.....	673
1896, " 909, § 11, subd. 2....	262	1899, " 370, § 15.....	672, 673
	263	1899, " 370, § 19.....	163, 164
1896, " 909, § 136.....	262	1899, " 370, § 20.....	163
1896, " 992.....	148	1899, " 661.....	242
1897, " 284.....	324, 325	1899, " 675.....	671
1897, " 312.....	33, 34	1900, " 760.....	148, 149
1897, " 378.. 65, 262, 287, 290, 292	745, 746	1900, " 774.....	688
		1901, " 95, § 5.....	262
1897, " 378, § 49, subd. 8.....	684	1901, " 232.....	261
1897, " 378, § 71.....	683	1901, " 354.....	185, 186
1897, " 378, § 96.....	745	1901, " 384.....	758-760
1897, " 378, § 413.....	68, 69	1901, " 466.....	287, 745-747
1897, " 378, § 455.. 65, 66, 68, 69	69	1901, " 466, § 50.....	684
1897, " 378, § 456.....	65, 69	1901, " 466, § 71.....	683
1897, " 378, § 457.....	65	1901, " 466, § 149.....	163
1897, " 378, § 458.....	745	1901, " 466, § 151.....	745
1897, " 378, § 526.....	65	1901, " 466, § 151, subd. 5....	163
1897, " 378, § 555.....	745	1901, " 466, § 195.....	163
1897, " 378, § 556.....	745	1901, " 466, §§ 258-260.....	745
1897, " 378, § 970 et seq....	287	1901, " 466, § 276.....	161, 163
1897, " 378, § 986.....	290, 291	1901, " 466, § 283.....	161, 163
1897, " 378, §§ 988, 989....	291, 292	1901, " 466, § 299.....	163
1897, " 378, § 1543.....	744	1901, " 466, § 315.....	919
1897, " 378, § 1586.....	261, 263	1901, " 466, § 383.....	746
1897, " 379.....	262	1901, " 466, § 389.....	745, 746
1897, " 408.....	659	1901, " 466, § 390.....	745
1897, " 415, § 18.....	143, 144	1901, " 466, § 405.....	745, 746
1897, " 415, § 81.....	20		

# SECTIONS OF CODE CIV. PROC. CITED.

xlv

	PAGE.		PAGE.
1901, chap. 466, § 612 .....	680, 684	1901, chap. 730 .....	161, 163
1901, " 466, § 727 .....	745	1902, " 37 .....	861, 862, 864
1901, " 466, § 728 .....	673	1902, " 204 .....	33
1901, " 466, § 970 et seq. ....	287	1902, " 270 .....	162
1901, " 466, § 986 .....	291	1902, " 580, § 257 .....	391
1901, " 466, §§ 988, 989 .....	291	1902, " 600 .....	731
1901, " 466, § 1055 .....	331, 349	1902, " 600, § 1, subd. 2. .	143, 144
1901, " 466, § 1055 et seq. ....	331	1902, " 600, § 3. . . . .	144, 835
1901, " 466, § 1060 .....	349	1903, " 85 .....	190, 191
1901, " 466, § 1061 .....	349	1903, " 115 .....	33
1901, " 466, § 1062 .....	349	1903, " 288 .....	763
1901, " 466, § 1067 .....	349	1903, " 371 .....	33
1901, " 466, § 1068 .....	349	1903, " 486 .....	34, 35
1901, " 466, § 1071 .....	349, 350	1903, " 515 .....	819, 820
1901, " 466, § 1073 .....	350	1904, " 187 .....	860
1901, " 466, § 1078 .....	350	1904, " 331 .....	515
1901, " 466, § 1080 .....	350	1904, " 353 .....	782, 784
1901, " 466, § 1087 .....	350	1904, " 696 .....	527, 530
1901, " 466, § 1088 .....	350, 351	1904, " 755 .....	900, 901
1901, " 466, § 1179 .....	745	1905, " 60 .....	238, 239
1901, " 466, § 1328 .....	745	1905, " 83 .....	34
1901, " 466, § 1543 .....	744, 745, 747	1905, " 144 .....	34
1901, " 466, § 1586 .....	261, 263	1905, " 476 .....	200-202
1901, " 607 .....	287	1905, " 621 .....	919
1901, " 723 .....	680, 684	1905, " 629 .....	684

## SECTIONS OF THE CODE OF CIVIL PROCEDURE CITED.

	PAGE.		PAGE.
Code C. P. chap. 9, tit. 3, art. 2 ....	516	Code C. P. § 583 ...	488-489, 497-489
chap. 12, tit. 5 .....	291	§ 541 .....	374
chap. 17, tit. 3 .....	285	§ 549 .....	543
§ 2 .....	28	§ 557 .....	543
§ 17 .....	29	§ 603 .....	675, 676, 678
§ 66 .....	26-29, 425	§ 721 .....	583, 584
§ 190 et seq. ....	289, 290	§ 722 .....	584
§ 380 .....	18, 19	§ 723 .....	583, 584
§ 381 .....	18, 19	§ 791, subd. 5 .....	159
§ 405 .....	767-769	§ 791, subd. 13 .....	182
§ 420 .....	614	§ 829 .....	77, 502, 916
§ 440 .....	531, 533, 584	§ 834 .....	514, 515, 517-520
§ 452 .....	251, 252, 813	§ 836 .....	514, 515, 517-520
§ 488 .....	813	§ 870 .....	527-530
§ 498 .....	813	§ 872 .....	815, 527-529
§ 499 .....	813	§ 872, subd. 4 .....	528
§ 516 .....	319	§ 873 .....	527
§ 522 .....	819	§ 911 .....	516, 518

## xlvi SECTIONS OF CODE OF PROCEDURE CITED.

	PAGE.		PAGE.
Code C. P. § 999.....	446	Code C. P. § 1822.....	36-38
§ 1010.....	540, 541	§ 2184.....	395, 396
§ 1015.....	511, 512	§ 2185.....	396
§ 1019.....	510-512	§ 2286.....	285
§ 1022.....	190, 191, 540	§ 2338.....	899
§ 1205.....	10, 11	§ 2339.....	816
§ 1279... 199, 293, 480, 578		§ 2546.....	511, 512, 547
	579	§ 2552.....	282
§§ 1280, 1281.....	480, 579	§ 2555.....	282
§ 1356..	291	§ 2670.....	464
§ 1361.....	291	§ 2684.....	461
§ 1557.....	617	§ 2714.....	282, 283
§ 1557, subd. 8.....	617	§ 2718.....	865, 866
§ 1577.....	617	§ 2726.....	38
§ 1627.....	477-479	§ 2727.....	37
§ 1627, subd. 1....	476, 479	§ 2730... 462, 896, 898-900	
§ 1628.....	476	§ 2743.....	38
§ 1670.....	276, 278, 279	§ 2802.....	896-898
§ 1671.....	238, 239, 538	§ 3251, subd. 1 ...	614
§ 1674.....	279, 280	§ 3253.....	836
§ 1742.....	190	§ 3320.....	900, 901
§ 1743.....	190	§ 3345.....	584
§ 1757, subd. 1.....	242	§ 3360.....	688
§ 1757, subd. 2 ...	242, 243	§ 3365.....	690
	246-253	§ 3379.....	688, 689
§ 1785... ..	147-149	§ 3380.....	688-692
§ 1785, subd. 8.....	147	§ 3382.....	690
§ 1786.....	147, 149	§ 3412.....	361, 362
§ 1788.....	147		

## SECTIONS OF THE CODE OF CRIMINAL PROCEDURE CITED.

	PAGE.		PAGE.
Code Cr. P. § 185.....	627	Code Cr. P. § 684.....	559
§ 225.....	559	§ 717.....	320
§ 485.....	320	§ 721.....	320, 322
§ 542.....	559	§ 722.....	320, 322
§ 672.....	559	§ 724.....	320

## SECTIONS OF THE CODE OF PROCEDURE CITED.

	PAGE.		PAGE.
Code Proc. § 11 et seq.....	289, 290	Code Proc. § 164.....	488
§ 11, subd. 3.....	288, 289	§ 274.....	10, 11
§ 136.....	11		



## RULES CITED.

xlvii

### SECTIONS OF THE PENAL CODE CITED.

---

	PAGE.		PAGE.
Penal Code, § 219.....	320	Penal Code, § 532.....	320
§ 529 .....	504, 505	§ 675.....	880, 881

---

## RULES CITED.

---

	PAGE.		PAGE.
General Rules of Practice, rule 10..	29	General Rules of Practice, rule 41..	910
80, 419		General Rules of Practice, rule 82..	528



# Cases

DETERMINED IN THE

## APPELLATE DIVISION

OF THE

## SUPREME COURT

OF THE

State of New York.

---

ALLEN B. FLANDERS, Appellant, v. ANNA ROSOFF and HELEN H. AMES, as Executrix, etc., of CLINTON AMES, Deceased, Respondents.

Third Department, January 8, 1906.

**Mortgage — specific performance — plaintiff must show performance on his part — when complaint for specific performance not amendable to allow recovery on quantum meruit.**

In an action to compel specific performance of a promise to execute a mortgage on real estate to secure a contractor who has erected a building thereon for the owner, it is incumbent on such contractor to show full performance on his part or to justify his failure so to do, and in the absence of such proof the complaint is properly dismissed.

In such action for specific performance it is not error to refuse to allow an amendment to the complaint to enable the plaintiff to recover for the erection of the building as for a *quantum meruit* when no evidence has been introduced showing the value of the work done and materials furnished.

*It seems*, that under such circumstances a recovery for a *quantum meruit* cannot be had under a complaint for specific performance or under an amendment for the purpose of allowing such recovery.

APPEAL by the plaintiff, Allen B. Flanders, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Franklin on the 11th day of March, 1904, upon the decision of the court, rendered after a trial before

APP. DIV.—VOL. CXI. 1

the court without a jury at the Franklin Trial Term, dismissing the complaint upon the merits.

*John P. Kellas* and *William S. Wade*, for the appellant.

*Martin E. McClary*, for the respondent Ames.

*Gordon H. Main*, for the respondent Rosoff.

CHESTER, J.:

The action is one in equity for the specific performance of a contract. The plaintiff sought to require the defendant to execute a mortgage on certain premises, upon which a building had been constructed by the plaintiff under a contract between him and the defendant Rosoff, for which the plaintiff alleged that the defendant Rosoff was to secure to be paid to the plaintiff \$1,200 by a first mortgage on the premises. The plaintiff alleged in his complaint that he had "in all things performed the said agreement on his part to be performed and duly constructed said building as he stipulated in said agreement to do." While the building was being constructed by the plaintiff the defendant Ames loaned the defendant Rosoff the sum of \$1,200 and received therefor a first bond and mortgage upon the premises described in the complaint.

The plaintiff alleged that at the time of the execution of such mortgage to the defendant Ames she had full knowledge of the agreement between the plaintiff and the defendant that the plaintiff was entitled to a first mortgage on the premises to secure the payment of the sum of \$1,200. The court found that neither at the time of the execution of the mortgage to Ames, or prior thereto, did she have any knowledge or notice that the plaintiff claimed the right or had the right to a first mortgage or to any mortgage upon the premises described in the complaint for any amount. It was shown that she had no knowledge unless she was charged with the knowledge which the attorney who examined the title and who procured the money from her to make the loan had, but it clearly appeared that the attorney was not her agent in examining the title and that he examined it for Rosoff, for whom he procured the loan and by whom he was paid for his services. So that if he had any such knowledge Mrs. Ames would not be bound thereby. Even as to the claim that the attorney had any such knowledge there was a

App. Div.]

Third Department, January, 1906.

question of fact for the determination of the court, and the finding that he had no such knowledge is supported by sufficient evidence.

The court has also found in great detail the respects in which the building did not conform in workmanship and materials furnished with the contract, and in addition thereto has found "that substantial, material and structural defects pervade the whole work and that said defects were intentional on the part of the plaintiff." These findings appear to be sustained by ample testimony.

The plaintiff having sought to recover upon the allegation of full performance on his part, the burden was upon him to show that to entitle him to the aid of the court in compelling performance by the other party. He failed to show that, and if the defendant Rosoff had moved to dismiss the complaint at the close of plaintiff's proof it would have been proper to have granted the motion upon that ground. When it affirmatively appeared in the defendant's evidence that the plaintiff had failed in many substantial respects to perform his contract the complaint was properly dismissed upon the merits. Authority for so plain a proposition is hardly deemed essential. Reference to but one, therefore, will be made.

Chancellor KENT in *Benedict v. Lynch* (1 Johns. Ch. 370) says: "It may, then, be laid down as an acknowledged rule in courts of equity (and so the rule is considered in the elementary treatises on this subject) (Newland on Contracts, 242; Sug. L. of Vend. 3d Lond. edit. 268), that where the party who applies for a specific performance has omitted to execute his part of the contract by the time appointed for that purpose, without being able to assign any sufficient justification or excuse for his delay; and when there is nothing in the acts or conduct of the other party that amounts to an acquiescence in that delay, the court will not compel a specific performance."

The appellant also contends that the court improperly denied him leave to amend his complaint, and he argues that such amendment has deprived him of any recovery in the action, even for the value of the work performed and materials furnished, on the theory that he had not fully performed. The application to amend was made at the close of all the testimony, and the proposed amendment if it had been allowed by the court would not have aided the plaintiff, for

he did not seek by the amendment to change the action from one for specific performance to one to enable him to recover as for a *quantum meruit*. Nor on the trial had the plaintiff offered any evidence as to the value of the work done or materials furnished by him in or upon the building, or tending to show such value, and if he deemed himself entitled to recover upon such *quantum meruit* it was incumbent upon him to produce such testimony. (*Spence v. Ham*, 163 N. Y. 220; *Norton v. U. S. Wood Preserving Co.*, 89 App. Div. 237, 241.) So that if the amendment had been allowed there could have been no recovery, under the evidence, upon the theory now insisted upon by the appellant. Nor indeed would such a recovery have been permissible under the complaint as interposed, or under the proposed amended complaint.

We have examined the numerous exceptions to the rulings of the court upon the admission and exclusion of evidence and find none that justifies a reversal.

The question is not presented, and we are not required to decide on this appeal, whether the judgment dismissing the complaint upon the merits would be a bar to another action upon the part of the plaintiff to recover from the defendant Rosoff for the value of the work performed and the materials furnished by him for the defendant Rosoff.

The judgment must be affirmed, with costs.

Judgment unanimously affirmed, with costs.

---

HARRY FANCHER, Respondent, v. FONDA, JOHNSTOWN AND GLOVERSVILLE RAILROAD COMPANY, Appellant.

Third Department, January 8, 1906.

**Negligence — injury to plaintiff by collision with trolley car while driving across tracks — contributory negligence.**

The plaintiff was injured by a collision with a trolley car running at forty-five miles per hour while attempting to drive across the tracks. The highway crossed the tracks in a diagonal direction and the plaintiff was required to look over his right shoulder to see cars coming from behind. He testified that while his horses were on the north track he looked and saw a car coming from

behind 200 feet away on the south track. His horses were going slowly. He testified that he thought he could get across.

*Held*, that the plaintiff was guilty of contributory negligence, for, being in a safe place when he first saw the car approaching, it was his duty to have stopped.

APPEAL by the defendant, the Fonda, Johnstown and Gloversville Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Montgomery on the 27th day of June, 1905, upon the verdict of a jury for \$125, and also from an order entered in said clerk's office on the 30th day of June, 1905, denying the defendant's motion for a new trial made upon the minutes.

*Nisbet & Hanson*, for the appellant.

*H. V. Borst and Harvey Book*, for the respondent.

CHESTER, J.:

The plaintiff was injured by a trolley car operated by the defendant, colliding with a wagon on which he was riding while he was attempting to cross the tracks of the defendant at a highway crossing at grade, a short distance easterly of the village of Cranesville. The defendant operates a double-track trolley road from the city of Amsterdam to the city of Schenectady on a private right of way. The Mohawk turnpike, upon which the plaintiff was driving, runs nearly parallel to the tracks of the defendant and the turnpike crosses the railway tracks obliquely. The turnpike and the railway, at the point in question, run easterly and westerly, the west-bound track of the railway is the northerly track and the east-bound the southerly. The plaintiff was driving a team with a load of sand on the turnpike, going easterly. The car which collided with him was proceeding easterly on the southerly track, which was farthest removed from the plaintiff as he approached the crossing. It was a limited car running at the rate of about forty-five miles an hour, and was not scheduled to stop at Cranesville. In order to see an approaching car plaintiff had to look behind him, except when he came to that point in the highway where it turned obliquely to cross the railway tracks, where the view was over his right shoulder. The accident happened on the thirtieth day of August, about a quarter to five in the afternoon, when it was broad daylight. The plaintiff testified: "When I got within about 200 feet of the crossing I

turned around and looked to see if there was anything coming and there was nothing coming. \* \* \* I looked west again when within about 20 feet of the railroad track and didn't see anything; then I could see up the railroad track about 1,000 feet or more. My team was in motion all the time until we were struck, kind of a slow gait. From this 20 feet where I looked I kept driving right along over the track, and when I was on the track I looked around and saw the car right on to me, within 200 feet. I was then on the track; the front wheels were on the north track; the horses were partly on the east-bound track." On cross-examination he said: "I first looked for the car when I was about 200 feet from the crossing. I turned around and looked back up the track as far as I could look. I saw nothing and heard nothing. I next looked at about 20 feet from the crossing and when the heads of the horses were about 10 feet from the crossing, and saw nothing. \* \* \* I looked again after I was on the track when the horses and front of the wagon were upon the north track. That is the last time I looked, when the horses were on the north track. That is the west bound track. As I looked I saw a car coming on the other track. It was east of the whistling post. That is the last look I took. \* \* \* Q. How far away was the car? A. About 200 feet. Q. What did you do? A. I tried to hurry the horses up to get across. Q. And you failed to get across and the car struck the hind wheel? A. Yes, sir. \* \* \* Q. Now, why on earth didn't you stop when you saw that car? A. I was thinking I had lots of time to get out of the way. Q. This is the reason; and it turned out you didn't have quite time enough? A. Yes. Q. As you looked you felt you could pass ahead of the car safely? A. I thought I could by their slowing down anyway."

If, as the plaintiff states, when he saw the car approaching at a distance of 200 feet away, his horses were on the *north* track, he was then in a place of safety and he should have stopped. He could easily have done so, for his horses were going slowly, on a slightly ascending grade, and were not restive or uncontrollable. Nor was he confronted with a double peril so as to be excusable for a mistake of judgment when he was in imminent danger. He apparently took his chances and lost.

It is true that the plaintiff also testified that when he saw the car



200 feet away "the horses were close to the other track; their heads were so close to it they would get hit," but when asked how far they were from the other track, he replied: "I don't know," and when asked, "where was your body then?" he replied: "Over the north rail of the north track." His counsel argues that this reply was made by the witness inadvertently under the stress, and excitement of a cross-examination and that what he meant to say was that he was over the south rail of the north track. The evidence of the witness on his cross-examination cannot all be reconciled with that given upon his direct. His effort in his testimony undoubtedly was to place himself in a position of extreme danger just before or at the time when he first saw the approaching car. The distance between the rails of the two tracks at the point in question is eight and one-half feet and the gauge of each track is about five feet, so that in passing over the crossing at right angles one would have to cover a distance of eighteen and one-half feet. But the highway crosses the tracks at this point obliquely and in following the regular course of the highway the distance in crossing is made greater and is thirty-four or thirty-five feet from the north rail of the north track to the south rail of the south track. This being the situation it would appear that even if it should be conceded that the plaintiff was on the south rail of the north track instead of on the north rail of the north track as he testified, with the approaching car 200 feet away, he could even then, if he had been at all solicitous for his welfare, have stopped or backed his team in time to have saved a collision. If, however, we take the plaintiff's statement that when he saw the car his horses' heads were so near to the east-bound track that they would get hit, as true, which cannot be harmonized with much of his other testimony to the contrary, it is nevertheless not seen how he can save his verdict, for the reason that he could not have got himself in that position except by failing to exercise ordinary care and caution. The last time he looked, according to his testimony, before he was on the tracks, was when he was twenty feet distant from the north-erly track. Why he did not see the rapidly approaching car at that point is not apparent, for the car must then have been in full view, and he had an unobstructed view of the tracks for a sufficient distance to have seen it. Knowing, as he did, that the defendant

ran limited cars at a speed of forty to forty-five miles an hour over this crossing, it was not sufficient for him to content himself with looking for an approaching car for the last time before entering upon the tracks when he was twenty feet distant therefrom, but he should have taken the precaution to have looked again before attempting to cross, and as he had a clear view all along there it was negligence on his part not to do so.

He says in his cross-examination that he thought he could pass if the car slowed down. While it was the duty of the motorman to exercise reasonable care in approaching the highway crossing, his negligence does not excuse the contributory negligence of the plaintiff.

The verdict of the jury upon the question of the plaintiff's contributory negligence is clearly against the weight of the evidence. For that reason the judgment should be reversed, with costs to the appellant to abide the event.

All concurred, except SMITH and CHASE, JJ., dissenting.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

---

CHARLES B. LAWTON, Respondent, v. SCOTT PARTRIDGE, Appellant,  
Impleaded with PETER HARRIS and Others, Defendants.

Third Department, January 8, 1906.

**Parties defendant — under complaint against joint defendants judgment may be had against one only — Code of Civil Procedure, section 1205, construed.**

Although a complaint sets out an action to recover for work, labor and services against joint defendants, a judgment against one of said defendants only is authorized by section 1205 of the Code of Civil Procedure. Said section is as broad as section 274 of the former Code of Procedure and requires the same construction.

The common-law rule no longer obtains.

APPEAL by the defendant, Scott Partridge, from a judgment of the Supreme Court in part in favor of the plaintiff and against the said defendant, entered in the office of the clerk of the county of Fulton on the 28th day of June, 1905, upon the verdict of a jury, the complaint being dismissed by direction of the court as to the other defendants.

App. Div.]

Third Department, January, 1906.

*Andrew J. Nellis and Lee S. Anibal, for the appellant.*

*Clarence W. Smith and William H. Bass, for the respondent.*

CHESTER, J. :

The plaintiff sued the defendant Scott Partridge and ten other persons, and in his complaint alleged "that heretofore and within six years last past the plaintiff or his servants or employees and teams performed work, labor and services for defendants at their request, knowledge and approval, which work, labor and services were rendered and performed upon lands which plaintiff was informed and verily believes belonged to or was\* occupied by the defendants herein; \* \* \* that said work, labor and services consisted of forty and seven-tenths (40.7) days of work with man and team at the price, amount and value of \$3 per day." It was also alleged that no part of the amount had been paid, and judgment was demanded for \$122.10, with interest from August 28, 1899. At the close of the plaintiff's proof the complaint was dismissed as to all the defendants except Partridge. At the close of the entire testimony the court denied a motion to dismiss the complaint as to Partridge. The ground of the motion was that the facts alleged are not such facts as to justify the proof of a several liability. The court then submitted the question to the jury as to whether Partridge was liable. The jury found a verdict in favor of the plaintiff and Partridge appeals.

It appeared in the proof that the appellant employed one Greene to level up and grade a racetrack, and to hire men and teams for that purpose, and that pursuant to such authority Greene employed the plaintiff and his teams upon the work. It was also shown that plaintiff's teams performed the amount of work alleged in the complaint, and that Greene reported the time to the appellant.

The claim of the appellant in this respect is that whatever he did was for a number of people interested in the racetrack, and that in what he did he was not acting for himself alone, and that plaintiff knew this.

The court charged the jury in substance that if they were satisfied from the evidence that appellant had the authority to bind

---

\* *Sic.*

somebody else, and did bind somebody else, for the work, then the appellant was not personally liable for it, and that if the plaintiff knew that defendant was not acting for himself but for others, then he would not be liable. He also charged the jury that if defendant in fact employed the plaintiff and that he had no authority to bind anybody else, then the jury might find the defendant personally liable; also, that if defendant employed plaintiff without disclosing his agency they might find the defendant liable. There is no criticism upon the law thus laid down by the court, and the verdict in favor of the plaintiff is supported by sufficient evidence.

The appellant insists, however, that there can be no recovery upon a several liability of the defendant under the plaintiff's complaint, which, as the appellant construes it, alleges only a joint liability.

There is no doubt but that this contention would have been good under the common law, but the rule was changed by section 274 of the Code of Procedure, which provided that "in an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper." Substantially the same provision has been carried into section 1205 of the Code of Civil Procedure, which provides that "where the action is against two or more defendants, and a several judgment is proper, the court may, in its discretion, render judgment or require the plaintiff to take judgment against one or more of the defendants, and direct that the action be severed and proceed against the others as the only defendants therein."

In *Stedeker v. Bernard* (102 N. Y. 327) ANDREWS, J., says: "The common-law rule that in an action against several defendants upon an alleged joint contract, the plaintiff must fail unless he establishes the joint liability of all the defendants, is no longer the rule of procedure in this State. By the former Code (§ 274) the court was authorized, in an action against several defendants, to render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment was proper. The court in construing this provision did not limit its application to cases of joint and several liability, but considered it as authorizing a separate judgment where a separate liability of some of the defendants was established on the trial, although the

App. Div.]

Third Department, January, 1906.

cause of action as alleged in the complaint was joint only. (*McIntosh v. Ensign*, 28 N. Y. 169; *Fielden v. Lahens*, 2 Abb. Ct. App. Dec. 111.) Section 1205 of the present Code is quite as comprehensive as section 274 of the former Code and requires the same construction."

*McIntosh v. Ensign* (28 N. Y. 169), which was one of the cases cited by Judge ANDREWS in the extract above quoted, was a case where the plaintiff complained against five defendants, alleging a joint liability, where two of the defendants appeared and answered, putting in a simple general denial; three other defendants were non-residents and do not appear to have been served, and a recovery was allowed against the answering defendants upon a several liability. In an opinion in that case, written by WRIGHT, J., he says: "The general rule of the common law undoubtedly was that in an action on an alleged joint contract the plaintiff must have recovered against all the defendants or been defeated. The recovery must have been against all or neither. If too many persons were made defendants, the plaintiff would have been nonsuited on the trial, if he failed in proving a joint contract. (1 Chitty's Pleadings, 31.\*)" But that is not the present rule. A plaintiff is not now to be nonsuited because he has brought too many parties into court. If he could recover against any of the defendants upon the facts proved, had he sued them alone, the recovery against them is proper, although he may have joined others with them in the action against whom no liability is shown. (Code, §§ 136, 274†; *Brumskill v. James*, 1 Kern. 294‡; *Marquat v. Marquat and wife*, 2 id. 336§; *Harrington v. Higham*, 15 Barb. 524; *Parker v. Jackson*, 16 id. 33.)"

It was held in *Brumskill v. James* (*supra*) that under the Code of Procedure, in an action on an alleged joint contract, the plaintiff might recover against one of several defendants who proved to be severally liable.

The judgment should be affirmed, with costs.

Judgment unanimously affirmed, with costs. KELLOGG, J., not sitting.

\* See 4th Am. ed.—[REP.]

† Code Proc. §§ 136, 274.—[REP.]

‡ 11 N. Y. 294.—[REP.]

§ 12 N. Y. 336.—[REP.]

RUBY ANNA VINES, Appellant, v. M. JOSEPHINE CLARKE, Respondent, Impleaded with JONATHAN FLANDERS and EMMA FLANDERS, His Wife.

Third Department, January 8, 1906.

**Will — power coupled with interest — conveyance by warranty deed for full value shows intention to exercise power — husband not necessary party to wife's deed.**

When the devisee of a life interest, who was also named executrix with full power to sell real estate, sells lands for full value and gives a warranty deed, the transaction itself shows an intention to exercise the power to convey the fee and not the life estate only.

Hence, the rights of a remainderman as against the grantee are cut off.

When the donee of a power to sell has also an interest in the subject of the power and makes a conveyance without reference to the power, it is a question of intention as to whether the conveyance was in pursuance of the power or only a grant of the interest.

It is not necessary for the husband of a donee of such power coupled with an interest to join in the wife's conveyance.

APPEAL by the plaintiff, Ruby Anna Vines, from a judgment of the Supreme Court in favor of the defendant Clarke, entered in the office of the clerk of the county of Saratoga on the 28th day of March, 1905, upon the decision of the court rendered after a trial before the court without a jury at the Saratoga Trial Term.

The action is for ejectment. The plaintiff claims to be entitled to recover the possession of an undivided one-fifth part of the premises described in the complaint as a remainderman under the will of Smith Mitchell, who died seized and possessed of such premises. By his will, which was proven in the Saratoga County Surrogate's Court September 26, 1870, he devised and bequeathed the use and income of all his real estate to his widow, Delinda Mitchell, for and during the term of her natural life; and upon her decease he devised an undivided one-fifth part of said real estate to the child or children of his son, Commodore P. Mitchell, subject to a life estate therein in favor of the said Commodore P. Mitchell. The latter is now deceased and the plaintiff is his only living child and there is no issue of any predeceased children. By his will said

App. Div.]

Third Department, January, 1906.

Smith Mitchell appointed his wife, Delinda Mitchell, as the sole executrix thereof with full power and authority to sell and dispose of all his real estate and to invest the proceeds in such manner as shall be most for the interest of the estate. Delinda qualified as executrix and served as such up to the time of her death in 1904. Before March 7, 1873, she married one Chancellor Pettigrew. On that day she and her husband joined in a deed conveying the premises in question to one Charles D. Ford for a consideration of \$1,100, which was the reasonable market value of the premises at the time of said conveyance. In the deed she described herself as the widow of Smith Mitchell, deceased, and the deed contained the usual covenants of warranty. The premises were thereafter conveyed by several mesne conveyances and were finally conveyed to the defendant Clarke who received and duly recorded her deed on December 3, 1898, and who paid the reasonable market value of said premises at the time of her purchase. The defendant Clarke has been in possession of said premises since said last-named date. The court on the trial dismissed the complaint and the plaintiff appeals from the judgment of dismissal.

*Corliss Sheldon*, for the appellant.

*Edgar T. Brackett* and *Hiram C. Todd*, for the respondent.

CHESTER, J.:

While Delinda Pettigrew, as the executrix of her husband's will, was thereby expressly given the absolute power of sale of his real estate, yet in the deed which she gave there is no mention of such power. The question presented for determination, therefore, is whether by such deed she conveyed the entire fee or simply her life estate. Section 124 of title 2 of chapter 1 of part 2 of the Revised Statutes (1 R. S. 737), which was in force when the deed was given, provided that "every instrument executed by the grantee of a power, conveying an estate \* \* \*, which such grantee would have no right to convey \* \* \*, unless by virtue of his power, shall be deemed a valid execution of the power, although such power be not recited or referred to therein."

In *Mutual Life Ins. Co. v. Shipman* (119 N. Y. 324) it was held

that the enactment of this provision of the Revised Statutes, which is couched in almost the identical language of section 155 of the present Real Property Law (Laws of 1896, chap. 547), and from which the provision of the Real Property Law was taken, did not change the rule of the common law as to the effect of a conveyance by the donee of a power who is also the possessor of other interests in the property to which the power relates when in the conveyance no mention is made of the power.

The common-law rule is well expressed by a quotation in the case cited from Sugden on Powers (3d Am. ed. p. 477) where it is said that "the doctrine settled by the decisions seems to be this: When the donee of a power to sell land possesses also *an interest* in the subject of the power, a conveyance by him without actual reference to the power will not be deemed an execution of it, except there be evidence of an intention to execute it or at least in the face of evidence disproving such intent."

Kent, in his Commentaries, says: "The power may be executed without reciting it, or even referring to it, provided the act shows that the donee had in view the subject of the power. \* \* \* The *general* rule of construction, both as to deeds and wills, is, that if there be an interest and a power existing together in the same person, over the same subject, and an act be done without a particular reference to the power, it will be applied to the interest, and not to the power. \* \* \* In construing the instrument, in cases where the party has a power, and also an interest, the intention is the great object of inquiry." (4 Kent Comm. [14th ed.] \*334-336.)

Chief Judge DENIO, writing the opinion of the Court of Appeals in *White v. Hicks* (33 N. Y. 383, 393), quotes with approval the language of Judge STORY in *Blagge v. Miles* (1 Story, 426), who, after examining the English cases on the subject, there says: "All the authorities agree that it is not necessary that the intention to execute the power should appear by express terms or recitals in the instrument. It is sufficient that it shall appear by words, acts or deeds demonstrating the intention."

The general rule stated by Kent and by Sugden is that contended for as applicable to this case by counsel for the appellant, but these eminent authorities each indicate that the general rule is



App. Div.]

Third Department, January, 1906.

nevertheless subject to the exception that effect must be given to the intention of the parties if that can be ascertained.

Here the intention is clear. The grantor received and the grantee paid full value for the premises, and the grantor covenanted that she would forever warrant and defend the grantee in the quiet and peaceable possession of the premises.

It is not to be presumed that the grantor would have taken full value for the premises, or that the grantee would have paid that amount, for the conveyance of a partial interest only. The deed in form being of the entire fee with a warranty of the title thereto shows clearly that the grantor intended to convey not only what she had as a life tenant but what she was entitled to dispose of by virtue of the power of sale. She also described herself as the widow of Smith Mitchell, which indicates that in some way she thought she could only give a good title to the entire fee as his representative. The deed was evidently prepared by some one unacquainted with the law, but nevertheless the intent to convey the entire estate is apparent, and if heed is given to such intent the complaint was properly dismissed.

The appellant relies upon the cases of *Weinstein v. Weber* (58 App. Div. 112) and *Mutual Life Ins. Co. v. Shipman* (*supra*), but these cases were brought squarely under the rule rather than under the exception, which it seems to me governs here.

The fact that the husband of Delinda joined in the conveyance is of no significance, for it was no more essential for him to join in a deed to convey his wife's life estate than to join in a deed of conveyance under the power of sale.

The judgment should be affirmed, with costs.

Judgment unanimously affirmed, with costs.

MARGARET KEESE, Respondent, v. MARTIN DEWEY, Appellant,  
Impleaded with MARY DEWEY, His Wife, and Others,  
Defendants.

Third Department, January 8, 1906.

**Statute of Limitations — when foreclosure barred — renewal mortgage executed when mortgagor had no title — when running of Statute of Limitations not stopped by such fraud — complaint failing to allege fraud.**

When more than twenty years have expired from the time a real estate mortgage became due, a recovery thereon is barred by the Statute of Limitations. Part payments within that time made by some of the mortgagors does not revive the action against a third joint mortgagor who made no payments and who did not authorize such payments.

When mortgagors, prior to the execution of a renewal mortgage, a part of the consideration whereof was a balance due on the prior mortgage, had sold the premises, their undiscovered fraudulent act in executing said renewal mortgage cannot be taken advantage of by the mortgagee in order to prevent the running of the Statute of Limitations on said prior mortgage under a complaint which contains no allegations of fraud, but which proceeds wholly on the theory that the mortgagee under the void renewal mortgage should be subrogated to rights under the former mortgage.

APPEAL by the defendant, Martin Dewey, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Clinton on the 3d day of January, 1905, upon the decision of the court rendered after a trial before the court without a jury at the Clinton Trial Term.

On the 2d day of November, 1889, Wallace Dewey and his wife executed and delivered a bond and mortgage for \$332, with interest, to one Daniel Keese, the mortgage covering a tract of seventy-five acres of land. There was due and unpaid thereon at the date of the decision \$585.92. Afterwards Daniel Keese died and his administratrix assigned the bond and mortgage to the plaintiff herein. Prior to the giving of said mortgage and on the 17th day of November, 1885, the mortgagors, Wallace Dewey and his wife, deeded the premises described in the mortgage to their daughter, the defendant Ellen Dewey, for an alleged consideration of \$1,000. At the time they executed and delivered said bond and mortgage they had no title to the premises covered by the mortgage. Upon the 2d day of November, 1889, the same day of the giving of the

App. Div.]

Third Department, January, 1906.

mortgage hereinbefore mentioned, a mortgage given by Wallace Dewey and his wife and Martin Dewey to said Daniel Keese, dated August 2, 1879, for \$277.50, with interest thereon, was satisfied of record. Said mortgage so satisfied covered said seventy-five acres of land and also another tract of one hundred acres and a further tract of fifty acres. The mortgage, dated August 2, 1879, became by its terms due and payable August 2, 1881. On August 2, 1889, the interest was paid on said last-named mortgage and at that date said mortgage had been reduced by the payment of principal and interest, leaving a balance of \$100 of principal due. Said sum of \$100, together with \$1.75 of interest thereon, formed a part of the consideration for the new mortgage dated November 2, 1889. Prior to the commencement of the action said Wallace Dewey and his wife died intestate, leaving as their sole heirs at law and next of kin the defendants Martin Dewey, Ellen Dewey, Patrick Dewey and John Dewey. The court on the trial found the foregoing facts. It also found that the satisfaction upon November 2, 1889, of the mortgage dated August 2, 1879, and the giving of the mortgage of November 2, 1889, formed a part of the same transaction; that the plaintiff had succeeded to all the rights of her father, Daniel Keese, the original mortgagee in the mortgages mentioned; that the mortgage of November 2, 1889, was void, as the mortgagors had no title to the premises at the time of the giving of the same and that the plaintiff was entitled to be subrogated to the security of the mortgage of August 2, 1879, and to have its discharge canceled and its liens restored, and the court directed a foreclosure of the mortgage of August 2, 1879, as to all the real estate covered by the mortgage, which at the time of the filing of the *lis pendens* in this action was in the hands of the original mortgagors, or their heirs, namely, of said one-hundred-acre tract and said fifty-acre tract. There was also a finding that there was due on the mortgage of November 2, 1889, the sum of \$585.92; that of that amount the sum of \$101.75, with interest from November 2, 1889, viz., \$193.63, was the sum remaining due on the mortgage of August 2, 1879, for which amount the plaintiff is entitled to judgment. From the judgment entered upon such decision the defendant Martin Dewey has appealed. Further facts are stated in the opinion.

*William L. Pattisson*, for the appellant.

*Seth S. Allen*, for the respondent.

CHESTER, J.:

By the judgment appealed from the lands which at the time of the giving of the mortgage of August 2, 1879, belonged to the defendant Martin Dewey individually are directed to be sold. One defense interposed by him was that the cause of action upon that mortgage was barred by the Statute of Limitations as against him. By the terms of the mortgage it became due and payable August 2, 1881. There is no proof that he ever made any payment upon it or upon the bond given concurrent therewith, or authorized any one to do so. On the contrary, the proof is that he never made any such payments. More than twenty years having elapsed since the mortgage became due and before the commencement of the action, and no payments having been made thereon or authorized by him, the statute barred the action as against him. (Code Civ. Proc. §§ 380, 381; *Mack v. Anderson*, 165 N. Y. 529.) The fact that payments were made by Wallace Dewey and his wife, who joined with the defendant Martin Dewey in making the bond and mortgage, does not prevent the running of the statute as against Martin, who made no payments. (*Shoemaker v. Benedict*, 11 N. Y. 176.) It is urged, however, by the respondent's counsel that the giving of the mortgage of November 2, 1889, by Wallace Dewey and wife, when the mortgagors had no title to the property mortgaged, was a fraud on plaintiff's assignor, and as the fact that the mortgagors had no title was not discovered until June, 1897, and as the fact that there was a prior mortgage was not discovered by the plaintiff until the summer of 1904, when she commenced the action, the running of the statute was suspended during the intervening time.

The answer to this suggestion is that there is no allegation of fraud in the complaint, and nothing from which it can be inferred, except the bare allegation that on November 17, 1885, the mortgagors, Wallace Dewey and wife, deeded the premises described in the mortgage of November 2, 1889, for an alleged consideration of \$1,000 to Ellen Dewey. The complaint is not based on fraud or mistake, but the theory of it is that the plaintiff's assignor loaned the mortgagors, Wallace Dewey and wife and Martin Dewey, the

App. Div.]

Third Department, January, 1906.

sum of \$332 for the purpose of paying off and satisfying the bond and mortgage of August 2, 1879, and that as Wallace Dewey and his wife were not the owners of the premises covered by the mortgage of November 2, 1889, at the time they gave the mortgage, the plaintiff was in equity entitled to have the satisfaction of the mortgage of August 2, 1879, canceled and the lien of that mortgage restored, the amount due thereon ascertained and to have the same foreclosed.

The plaintiff, therefore, is in no position to take advantage of the existence of any undiscovered fraud to prevent the running of the Statute of Limitations, for that question is not involved in the action under the pleadings.

The judgment must be reversed on the law and on the facts and a new trial granted, with costs to the appellant to abide the event.

All concurred.

Judgment reversed on law and facts and new trial granted, with costs to appellant to abide event.

---

ISAIAH WALKER, Respondent, v. NEWTON FALLS PAPER COMPANY,  
Appellant.

Third Department, January 8, 1906.

**Negligence — injury by set screw in revolving shaft — unsafe place to work — evidence of prior accident — extra allowance improper.**

The plaintiff, sent to repair an elevator, in stepping over a revolving shaft was caught by a set screw projecting one and a quarter inches from the shaft and was injured. The set screw was not covered and the plaintiff had not been warned thereof. The place was dark and plaintiff was working with a hand lantern. He gave evidence of due care. It was shown that other employees were required to go to said place to make repairs, and that one of them had previously been caught by the same set screw, of which fact the defendant had notice.

*Held*, that the question as to whether the defendant had provided a safe place to work was for the jury;

That a verdict for the plaintiff was warranted by the evidence;

That, under the circumstances, the risk was not obvious;

That proof of said prior accident from same cause was proper;

That an extra allowance was improper.

APPEAL by the defendant, the Newton Falls Paper Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of St. Lawrence on the 14th day of January, 1905, upon the verdict of a jury for \$5,000; also from an order entered in said clerk's office on the 5th day of January, 1905, denying the defendant's motion for a new trial made upon the minutes, and also from an order entered in said clerk's office on the 14th day of January, 1905, granting the plaintiff an extra allowance of costs.

*Thomas Burns*, for the appellant.

*Thomas Spratt* and *George E. Van Kennen*, for the respondent.

CHESTER, J. :

This case was here on a former appeal, and as the facts are quite fully stated in the report of our decision on that appeal (99 App. Div. 47), substantially all of which are again proven in this record, it is unnecessary here to restate the facts in detail. The only fact of any importance there stated which was not proven on the trial now to be reviewed was that the set screw which caused the plaintiff's injuries had been uncovered by the defendant before the accident and the covering had not been replaced, but then, as now, the proof was that it was uncovered at the time of the accident.

On the former appeal, while we held that the case presented questions of fact for the determination of a jury in the first instance, we affirmed the order of the trial justice in setting aside the verdict and granting a new trial as a matter largely resting in his discretion, although it appeared to us a serious question whether the evidence given was not sufficient to sustain the verdict.

On this trial the plaintiff has again had a verdict and the defendant appeals.

The charge of negligence is that the plaintiff was not furnished a safe place to work because the set screw was not properly guarded.

The plaintiff's counsel does not contend that the failure to guard the set screw, as required by the provisions of section 81 of the Labor Law (Laws of 1897, chap. 415, as am. by Laws of 1899, chap. 192) alone renders the defendant liable, but insists that this set screw, having been left unguarded in the place where it was, and so near

App. Div.]

Third Department, January, 1906.

the place where the plaintiff was required to work, a question of fact was presented for the determination of the jury as to whether the defendant had provided him a safe place to work.

The place was at the top of a stuff chest twelve feet above the floor, where the plaintiff was required by the defendant's superintendent to go to repair a freight elevator. The place was dark and unlighted, except by the lantern which plaintiff carried. There were numerous pipes, shafts, belts and pulleys and much gearing over the stuff chest that interfered with plaintiff's free access to the gearing that moved the elevator. In experimenting with the elevator the plaintiff concluded the trouble with it was in the cog wheel on the gearing. In order to get where he could see that, he had to step over the shaft on which the set screw, which was about one and one-quarter inches long, was revolving, and as he did so he was caught by his trousers leg and his right leg injured so it had to be amputated. He testified that there was no way he could get to where he believed the difficulty was except the way he went. McDonald, who was working with him, also testified that there was no other way for the plaintiff to get where he could examine this gearing except the way he was going.

The proof shows that in the operation of the mill the employees of the defendant were daily required to go upon the top of this stuff chest to oil the machinery and to perform other duties, and were frequently required to go there to make repairs. It was also shown that in May preceding the accident another employee had been caught on the bottom of the leg of his overalls by the same set screw, and that one of defendant's bosses had been informed of this.

It was a question for the jury under all these circumstances to determine whether the defendant had provided the plaintiff with a safe place to work. (*Glens Falls Portland Cement Co. v. Travelers' Ins. Co.*, 162 N. Y. 402; *Eastland v. Clarke*, 165 id. 420.)

There is no question as to the assumption of the risk by the plaintiff, for he had no knowledge of the existence of the set screw, and it cannot be said that the risk was an obvious one. He testified that before he put his right foot over the shaft he lowered his lantern and looked at the shaft as it was revolving, but did not see the set screw. Manifestly it would be difficult, if not impossible, to see

a revolving set screw of the size of this one in daylight, but in a dark place, with the aid of a hand lantern only, it is evident that the revolving screw could not be seen.

The questions as to whether the defendant was negligent and the plaintiff free from contributory negligence were submitted to the jury in a fair charge, and while the questions were close ones we think there was sufficient evidence to sustain the verdict and that we ought not to disturb it.

The appellant complains that the court improperly allowed the plaintiff to show that a prior accident had been caused by this same set screw, but it appeared that it happened under substantially the same circumstances as those existing at the time the plaintiff was injured, and in a similar manner. It was not error, therefore, to receive the evidence. (*Lundbeck v. City of Brooklyn*, 26 App. Div. 595; *Wooley v. Grand St. & Newtown R. R. Co.*, 83 N. Y. 121.)

This is an ordinary action of negligence, and is, perhaps, the most frequent or common kind of action with which the courts have to deal. While the case presented close questions for determination, it cannot fairly be regarded as a difficult one. The case being neither difficult nor extraordinary, we think the extra allowance of costs was inadvertently granted. (*Standard Trust Co. v. N. Y. C. & H. R. R. Co.*, 178 N. Y. 407.)

The order granting the extra allowance should be reversed, with ten dollars costs and disbursements, and the judgment and order denying a new trial should be modified by striking from the judgment the amount of the extra allowance, and as so modified should be affirmed, with costs.

Order granting extra allowance reversed, with ten dollars costs and disbursements. Judgment and order denying new trial modified by striking from the judgment the amount of the extra allowance, and as so modified unanimously affirmed, with costs. KELLOGG, J., not sitting.



In the Matter of the Final Judicial Settlement of the Account of Proceedings of WILLIAM A. SMITH and IRVING R. COUGHTRY, as Executors, etc., of MATHEW W. BENDER, Deceased, Appellants.

In the Matter of the Application of ROBERT G. SCHERER and J. MURRAY DOWNS, Constituting the Firm of SCHERER & DOWNS, Respondents, to Have Their Lien for Services Determined and Enforced.

In the Matter of the Application of WILLIAM A. SMITH and IRVING R. COUGHTRY, Appellants, to Substitute Messrs. DYER & TEN EyCK, of the City of Albany, New York, as Attorneys in the Place and Stead of Messrs. SCHERER & DOWNS, Respondents.

Third Department, January 8, 1906.

**Attorney and client — power of surrogate to order reference to determine amount of attorney's compensation for services to executors — personal judgment not authorized in such proceedings.**

A surrogate has power, under section 66 of the Code of Civil Procedure, upon petition, to determine the value of services rendered by an attorney to executors and to charge the same as a lien upon the estate. To that end he may appoint a referee to take testimony and report the value of said services.

Although executors are primarily personally liable for the services of an attorney, yet such services, when necessary, are chargeable as a lien upon the estate.

The Appellate Division will confirm the findings of such referee and surrogate as to the value of such services when the findings are not against the weight of the evidence.

When it is found by the surrogate that the services of an attorney are chargeable as a lien upon the estate there is no authority to direct a personal judgment and execution against the executor as in a common-law action.

APPEAL by William A. Smith and Irving R. Coughtry, as executors etc., of Mathew W. Bender, deceased, and as legatees under the will of the said Mathew W. Bender, deceased, from an order of the Surrogate's Court of the county of Albany, entered in said Surrogate's Court on the 30th day of December, 1904, confirming the report of a referee, and directing that Robert G. Scherer and J. Murray Downs recover of said William A. Smith and Irving R. Coughtry, individually and as executors of said will, the amount found due them for services as attorneys and counsel and making the same a lien on the assets of the estate of said Mathew W. Bender,

deceased ; and also from the order entered in said Surrogate's Court the 14th day of June, 1904, appointing Judson S. Landon referee to take proof as to the amount, character and value of the services rendered by said attorneys to said Smith and Coughtry individually and as such executors and report the same to the court.

Mathew W. Bender, of Albany, made his last will and testament on the 1st day of June, 1900. On the 9th day of July, 1900, he transferred all his property to William A. Smith, in trust for his own benefit during his life, and said Smith accepted the trust and took possession of said property and held the same during the life of said Bender. Mathew W. Bender died on the 21st day of May, 1903, and his said last will and testament was admitted to probate on the 25th day of May, 1903, and letters testamentary were on that day issued to said William A. Smith and Irving R. Coughtry who were named as executors in said will. By said will said William A. Smith was given a legacy of \$2,000 and Irving R. Coughtry a legacy of \$5,000, each in lieu of legal commissions as executor and trustee ; \$30,000 was given to William A. Smith in trust to pay the income to the testator's son, Frederick H. Bender. The will also contained various other bequests, and the residue of the estate was given to five persons in equal shares. Said Irving R. Coughtry is one of said residuary legatees. The said Frederick H. Bender was the only heir at law and next of kin of said Mathew W. Bender, and he died on the 1st day of May, 1904, without leaving a widow or descendant. Scherer & Downs, attorneys and counselors at law at Albany, were employed by said executors as their counsel and they procured the probate of said will. The property of Mathew W. Bender being wholly in the possession of Smith as trustee under the express trust, an action was brought in the Supreme Court in the name of Smith as such trustee against Frederick H. Bender, and Smith and Coughtry, as executors, and all the legatees and persons interested under said will of Mathew W. Bender for an accounting by said plaintiff. There were one or more appearances in that action and a guardian *ad litem* was appointed for an infant defendant, but there was no answer or contest therein. On or about the 6th day of July, 1903, Scherer & Downs rendered to Smith, as trustee, a bill as follows : "To preparing trust agreement between Mathew W. Bender and William A. Smith, and advice and counsel

App. Div.]

Third Department, January, 1906.

to William A. Smith as such trustee pertaining to matters between said William A. Smith and Mathew W. Bender, from July 1st, 1900, to May 22nd, 1903, \$500."

Smith insisted that this bill was too large, and it is claimed by Smith and Coughtry that they were told by one of said attorneys that the \$500 included payment for their services in the release and discharge of Smith as trustee and in the probate of the will. The statements of Smith and Coughtry as to what was included in said bill are disputed. Subsequently and on July 29, 1903, judgment was obtained in the accounting action at Special Term in which judgment Scherer & Downs, as attorneys and counsel for the plaintiff, were allowed taxable costs amounting to \$135.50 and an extra allowance of \$1,000. Smith, as trustee, declined to pay the costs and extra allowance. He says he was told that these amounts were allowed by the judge and that he was also threatened with suit if he did not pay, and that on July 31, 1903, he paid the amounts, namely, \$1,000 and \$135.50. Coughtry was then out of town, and on July 30, 1903, Scherer & Downs wrote to him, stating in the letter that the court had allowed them an extra allowance of \$1,000 besides the costs of the action. Coughtry did not reply to such letter and Scherer & Downs were continued as counsel for the executors. Smith, as trustee, then transferred the property held by him to the executors in accordance with the provisions of said judgment in the action for an accounting, and an inventory was duly taken under charge of said attorneys, which shows that the estate then amounted to \$94,174.50. The executors had many consultations with their counsel in regard to the estate and relating to the interests thereof. Said attorneys appeared for the executors before the transfer tax appraiser and filed a brief with him in relation to said tax. They appeared before the assessors of the city of Albany and obtained a reduction of the personal assessment against the executors as such from \$90,000 to \$20,000. In view of the fact that some of the legacies given by the will might be declared void they obtained an assignment from Frederick H. Bender of any interest that he might have in his father's estate other than his income on the trust fund given for his benefit by said will. They prepared the executors' account and commenced the proceeding for a final judicial settlement of the account of said executors in the Surro-

gate's Court and obtained the service of the necessary citations therefor and for the construction of said will in connection with the distribution of the estate. On such accounting two questions arose as to the construction of said will. The oral argument on behalf of the different persons appearing in relation to such construction was had and briefs were filed thereon. On April 5, 1904, at an adjourned day of said proceeding in the Surrogate's Court it appeared that an item of \$1,500 credited in the executors' account as paid to the attorneys in full of all services performed for the executors, commencing with the probate of the will and including the accounting and the final distribution of the estate and any action or proceeding relating to the construction of said will, had not in fact been paid, and a controversy arose as to the amount that should be paid said attorneys and an adjournment of the proceeding was taken. Scherer & Downs then filed their petition in the Surrogate's Court, praying that the surrogate "by virtue of the powers conferred upon him by section 66 of the Code of Civil Procedure will determine the extent and the amount of the lien of your petitioners for their services and enforce the same." A citation was thereupon issued to said executors requiring them to show cause why the lien of said attorneys should not be determined and enforced. The executors thereupon filed a petition asking that "an order be made substituting Dyer and Ten Eyck, Esqs., attorneys and counselors for your petitioners in the above-entitled proceeding now pending in this court in the place and stead of Scherer and Downs, Esqs." The answer of the executors to the petition of Scherer & Downs refers to their services commencing with the proof of the will and further alleges that the said services were not worth to exceed \$350. It also alleges that at the time Smith, as trustee, paid said \$500 the attorneys stated that it included pay for the probate of said will; it also alleges the payment by Smith, as trustee, of said costs and extra allowance granted in the accounting action in the Supreme Court. The answer of the attorneys to the petition of the executors asks that the value of their services be ascertained and that the substitution of attorneys be made on condition that the amount found to be due for their services be made a lien upon the fund in the hands of the executors. The Surrogate's Court appointed a referee "to take proof as to the amount, character and

App. Div.]

Third Department, January, 1906.

value of the services rendered by the said Scherer & Downs on behalf of the said William A. Smith and Irving R. Coughtry individually and as executors and as to any payments made on account thereof, and to report such proof and opinion of the referee to the court." Hearings were had before the referee and he reported :

"*First.* That the value of the services rendered by Messrs. Scherer & Downs on behalf of William A. Smith and Irving R. Coughtry individually and as executors, in the above-entitled matters respectively referred to me as aforesaid, is the sum of \$1,500.

"*Second.* That they have been paid upon account thereof by the said executors the sum of \$200.

"\* \* \* I am inclined to think that this item of \$1,000 is pertinent to the matter before me. To say the least, the right of Scherer & Downs to it is not free from doubt. \* \* \* Evidence was given as to the value of the services of Scherer & Downs varying in estimate from \$650 to \$2,500. \* \* \* Before the proceedings for the accounting were instituted, but in anticipation of instituting them, Scherer & Downs fixed the price that they would ask to have allowed them upon the accounting at \$1,500. \* \* \* While that bill for \$1,500 is not conclusive against them it is high evidence of their estimate of the value of their services. Doubtless they fixed that price in view of the \$1,000 they had received from the estate under the order for extra allowance in addition to the \$500 paid them as aforesaid by the trustee Smith. \* \* \* I think \$1,500 under the circumstances a reasonable compensation for their services."

The surrogate, however, in separate findings held that the payment of said extra allowance and costs in the accounting action was "not in issue and not pertinent to issue" in these proceedings. The report of the referee was confirmed by the surrogate and the order appealed from was entered.

*Jacob L. Ten Eyck*, for the appellants.

*J. Murray Downs*, for the respondents.

CHASE, J. :

It is provided by section 66 of the Code of Civil Procedure as follows : "The compensation of an attorney or counsellor for his

services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action or special proceeding, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, decision, judgment or final order in his client's favor and the proceeds thereof in whosoever\* hands they may come; and the lien can not be affected by any settlement between the parties before or after judgment or final order. The court upon the petition of the client or attorney may determine and enforce the lien."

By the amendment of said section in 1899 (Laws of 1899, chap. 61) a special proceeding was included therein, and the court was given express authority upon the petition of the client or attorney to "determine and enforce the lien" therein mentioned. Surrogates' Courts are now courts of record (Code Civ. Proc. § 2) and the Constitution of 1894 (Art. 6, § 15) provides: "Surrogates and Surrogates' Courts shall have the jurisdiction and powers which the surrogates and existing Surrogates' Courts now possess, until otherwise provided by the Legislature."

The Court of Appeals in *Matter of Regan* (167 N. Y. 338) say: "It seems to us that the power of the Surrogate's Court to protect the lien of an attorney has been assimilated by modern legislation to the power exercised in that respect by the Supreme Court and the other courts of record of the State. There is now no reason that we can perceive for denying this power to a court that exercises such extensive jurisdiction over persons and property. An attorney, duly admitted to practice in all the courts of record of the State, is an attorney of the Surrogate's Court, and his functions as an officer of that court are quite as important to the community and to his clients as the services that he may perform in any other court. \* \* \* It must be regarded as settled law in this State that an attorney who has procured for his client a judgment or decree has a lien upon the same for his compensation, and this lien is not confined to mere taxable costs but to such sum as he is entitled to receive under his retainer or under an agreement expressed or implied."

---

\* *Sic.*

App. Div.]

Third Department, January, 1906.

In *Matter of Fitzsimons* (174 N. Y. 15) the court, on an appeal from an order made in a proceeding before the surrogate for a compulsory accounting by an administratrix and in which the appellant, an attorney, presented a petition setting forth facts entitling him to a part of any recovery to which his clients would be entitled upon such accounting and to compensation as attorney for the contestants, say: "That the proceeding instituted by the appellant to establish his lien was a special proceeding which might be properly instituted in a Surrogate's Court there is now no doubt."

In *Matter of King* (168 N. Y. 53) the court, in discussing the question of the jurisdiction of the Supreme Court to determine the amount of indebtedness in a proceeding under said section 66 of the Code of Civil Procedure, say: "We do not understand the clause to be violative of the provisions of the Constitution, or that the parties were entitled to a jury trial. In this case the petitioners had a lien created by statute. The proceedings provided for by the Code are instituted by a petition and are in the nature of the foreclosure of a lien."

The statute must be construed liberally (*Fischer-Hansen v. Brooklyn Heights R. R. Co.*, 173 N. Y. 492), and as so construed it gives to Surrogates' Courts power to determine the lien and the amount thereof and to enforce it.

Rule 10 of the General Rules of Practice provides: "An attorney may be changed by consent of the party and his attorney or upon application of the client upon cause shown and upon such terms as shall be just, by the order of the court or a judge thereof, and not otherwise."

The General Rules of Practice are applicable to Surrogates' Courts. (Code Civ. Proc. § 17. See *Chatfield v. Hewlett*, 2 Dem. 191; Jessup Surr. Pr. 126.) The proceeding for a judicial settlement of the account of the executors was pending when the proceedings by the appellants and respondents respectively were commenced. The proceedings by the appellants and respondents respectively were heard and determined as one proceeding, and by the petitions and answers the substantial question for the determination of the court was the amount which should be paid to the attorneys from the estate of the deceased. Primarily an executor personally and not the estate is liable for all contracts made by him

in the execution of his trust. Notwithstanding this rule, the necessary expenses of administering an estate may be regarded as a charge upon, although not a debt against the estate, and when the expenses incurred by an executor are by the court found to be necessary and proper in the administration of the estate they are payable from the estate. (*Shaffer v. Bacon*, 35 App. Div. 248; *affd.*, 161 N. Y. 635; 18 Cyc. 443; 11 Am. & Eng. Ency. of Law [2d ed.], 1240.)

An attorney has a lien for his compensation for professional services and for disbursements upon the moneys and property received by him on his client's behalf in the course of his employment. This right of lien is not affected by the fact that the client is an executor and the services were rendered and moneys and property received on behalf of the estate, nor is it confined to moneys and property recovered by judgment. (*Matter of Knapp*, 85 N. Y. 284; 4 Cyc. 1015, 1016; *Arkenburgh v. Little*, 49 App. Div. 636, with opinion in same case *sub nom.* *Arkenburgh v. Arkenburgh*, 27 Misc. Rep. 760; *Matter of Crouch*, 41 id. 349; *Krone v. Klotz*, 3 App. Div. 587; *Halbert v. Gibbs*, 16 id. 126.)

The record does not disclose that any one at any time suggested that if the court had jurisdiction to determine the amount of the attorneys' lien for services that the lien should be confined to services rendered after the commencement of the proceeding for a judicial settlement of the executors' account. It seems to have been assumed without controversy or objection that with the two proceedings before the court an allowance should be made, if at all, for all services rendered to the executors in the administration of the estate and for which the estate should pay. It may be assumed from the record that the attorneys had papers of the estate in their possession to which a lien would attach for services and which fact the court could consider in determining under rule 10 of the General Rules of Practice *what would be just* on the substitution of attorneys as asked by the appellants. The referee's report is in effect that the attorneys, in addition to the amounts already received by them, were entitled from the estate to \$1,500, from which should be deducted a payment thereon of \$200. No services were shown to have been performed for the executors as legatees or for them individually apart from the services, the amount of which were proper expenditures from the estate of the deceased. Nothing was directed



App. Div.]

Third Department, January, 1906.

by the order to be paid by said executors individually beyond or in addition to the amount made a lien upon the assets of said estate.

The order of the Surrogate's Court confirmed the report of the referee in all things. The findings submitted to and made by the surrogate months after the order had been made and entered were somewhat contradictory when taken in connection with the order confirming in all things the referee's report; but such findings do not change the question now before us for consideration. The report of the learned referee and the order of the Surrogate's Court confirming said report are principally based upon the determination of questions of fact. The evidence was conflicting, and the learned referee and the court, with the parties and witnesses before them, have determined such questions in favor of the respondents, and we cannot say that their determination is against the weight of evidence.

The surrogate has by the order found that the amount found due the attorneys is a lien on the assets of the estate and must be paid before the substitution of attorneys takes effect. The order goes further and directs that the respondents have execution against the executors individually for the amount so found due the respondents. This in effect directs a judgment in favor of the respondents against the appellants individually as in a common-law action for work, labor and services. We are not aware of any authority in the Surrogate's Court to make that part of the order. The order should be modified by striking therefrom that part thereof directing that execution issue against the executors individually for the amount directed to be paid to the attorneys, and as so modified affirmed, without costs.

All concurred.

Motion to dismiss denied. Order modified by striking therefrom that part thereof directing that execution issue against the executors individually for the amount directed to be paid to the attorneys, and as so modified affirmed, without costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. DANIEL F. FLINN and WILLIAM J. CASSIDY, Relators, v. PATRICK W. CULLINAN, as State Commissioner of Excise of the State of New York, Respondent.

Third Department, January 8, 1906.

**Liquor Tax Law**—when certiorari refused to review right of Commissioner of Excise to make enumeration of inhabitants of city and to increase cost of liquor tax certificate.

Certiorari will not lie to determine the right of the State Commissioner of Excise to take an enumeration of the inhabitants of the city of Schenectady, pursuant to section 11 of the Liquor Tax Law, and to increase the cost of liquor tax certificates in said city, when, since the issue of said writ, a State census of the inhabitants of said city has been taken, and the relator paid the increased sum without a demand that the certificate issue at the former cost, but with a mere protest at said increased cost.

The acts of the State Commissioner of Excise in making such enumeration and in certifying to the county treasurer the increased cost of licenses were not such final determination of the rights of a relator paying said increased cost as entitles him to a common-law certiorari to review such acts.

CERTIORARI issued out of the Supreme Court and attested on the 27th day of May, 1905, directed to Patrick W. Cullinan, as State Commissioner of Excise of the State of New York, commanding him to certify and return to the office of the clerk of the county of Schenectady all and singular his proceedings had in causing to be made an enumeration of the inhabitants of the city of Schenectady, and in certifying the same to the county treasurer of the county of Schenectady.

*Flinn & Roland* [*J. Newton Fiero* of counsel], for the relators.

*William E. Schenck* [*Theodore E. Hancock* of counsel], for the respondent.

CHASE, J.:

The relators, for two years and more prior to May 1, 1905, were partners engaged in the business of trafficking in liquors at Schenectady, N. Y. During that time they held a liquor tax certificate permitting them to traffic in liquors under subdivision 2 of section 11 of the Liquor Tax Law (Laws of 1896, chap. 112, as amd. by Laws of

App. Div.]

Third Department, January, 1906.

1897, chap. 312, and Laws of 1903, chap. 115). The city of Schenectady was incorporated in 1798 (Laws of 1798, chap. 50). By the State census taken in 1892 the population of said city was found to be 22,858, and by the United States census taken in 1900 the population of the city was found to be 31,682. The population of said city increased very rapidly after 1900. By chapter 204 of the Laws of 1902 the boundaries of said city were changed, by which change the area of said city was nearly doubled, and more than 8,000 inhabitants were added to said city by reason of such increase of territory. By chapter 371 of the Laws of 1903 the several acts relative to the city of Schenectady were generally amended and consolidated. After the passage of said acts of 1902 and 1903 liquor tax certificates were granted to the relators to traffic in liquors under said subdivision 2 of section 11 of the Liquor Tax Law on payment of \$300 until 1905. Pursuant to the directions of the State Commissioner of Excise a special agent of said Commissioner, commencing January 24, 1905, and ending January 30, 1905, made an enumeration of the inhabitants of said city and found the number thereof to be 55,382. Said State Commissioner of Excise on January 31, 1905, wrote a letter to the county treasurer of the county of Schenectady, of which the following is a copy :

"Pursuant to section 11 of the Liquor Tax Law, the Department has caused to be taken an enumeration of the city of Schenectady, Schenectady County, N. Y., which enumeration was closed on January 30th, 1905, and by and from the result of such enumeration there has been ascertained and determined a population of 55,382 inhabitants in said city. The tax which will hereafter be assessed for liquor tax certificates issued for the city of Schenectady will be as follows :

"Subdivision 1, \$750.

"Subdivision 2, \$450 \* \* \*."

On May 1, 1905, the relators went to the county treasurer and paid to him \$450, and obtained a liquor tax certificate under said subdivision 2 of section 11 of the Liquor Tax Law for the year commencing that day. At the time of paying said money and taking such certificate, the relators filed with the county treasurer a letter signed by them and directed to said county treasurer, of which the following is a copy :

APP. DIV.—VOL. CXI. 3

"Enclosed find our check to cover cost of license for ensuing year; we protest payment of increase in license over last year, amounting to One hundred and fifty (\$150) Dollars."

Thereafter and on May 27, 1905, the relators presented their petition to the Supreme Court and obtained the writ of certiorari now before us in which writ they claim that the action and determination of the State Commissioner of Excise in making said enumeration and certifying the same to the county treasurer of the county of Schenectady was illegal, and they asked that the same may be reviewed and corrected. The \$450 was not paid under a mistake of fact. (*Baker v. Bucklin*, 43 App. Div. 336.)

No effort was made by the relators to obtain from the county treasurer a liquor tax certificate on payment of \$300. The certificate by the State Commissioner of Excise to the county treasurer, although evidence of the result of the enumeration taken by him, did not compel the relators to pay \$450 instead of \$300 for the liquor tax certificate, unless the statute authorized the State Commissioner of Excise to make the enumeration. (*Matter of McGreivay*, 37 App. Div. 66; *affd.*, 161 N. Y. 645; *Lyman v. McGreivay*, 25 App. Div. 68; *Matter of Van Steenburgh*, 24 Misc. Rep. 1; *People ex rel. Cramer v. Medberry*, 17 id. 8.)

The question as to the enumeration cannot arise on applications to issue liquor tax certificates hereafter, for since the granting of this writ a State census has been taken, including the inhabitants of the city with its enlarged boundaries pursuant to chapter 83 of the Laws of 1905 (as *amd.* by Laws of 1905, chap. 144).

It is unnecessary to discuss the question as to whether Schenectady was a "new city" in January, 1905, or as to whether the writ of certiorari provided by subdivision 1 of section 28 of the Liquor Tax Law (as *amd.* by Laws of 1897, chap. 312) is exclusive of the common-law remedy by certiorari because these questions as now presented are academic.

It is not contended that the relators can obtain any money or effective relief in this proceeding. By section 13 of said Liquor Tax Law (as *amd.* by Laws of 1903, chap. 486), one-half of the taxes collected pursuant to the act must be paid by the county treasurer to the Treasurer of the State of New York, and one-half thereof to the treasurer of the city of Schenectady, in which the traffic in

App. Div.]

Fourth Department, January, 1906.

liquor is carried on within ten days after the receipt thereof after deducting the amount allowed for collecting the same. The statute operates upon the fund from the very moment of its collection (*People ex rel. Einsfeld v. Murray*, 149 N. Y. 367), and it is to be presumed that the money received by the county treasurer from the relators has been paid over as provided by the statute. The State Commissioner of Excise, to whom this writ is directed, is not in the possession of said moneys. The only purpose of this writ suggested to us is that if the relators can get an expression of the court as to the right of the State Commissioner of Excise to make the enumeration as stated that perchance some legislation may be obtained by which a claim can be presented against the State of New York for excess of liquor taxes paid by the relators and have such claim heard and determined by the Court of Claims. We conclude that the directions of the State Commissioner of Excise in regard to said enumeration and a certificate to the county treasurer were not such final determinations of the rights of the relators as to entitle them to a common-law writ of certiorari to review said direction and certificate.

The writ of certiorari should be dismissed, with fifty dollars costs and disbursements.

All concurred.

Writ of certiorari dismissed, with fifty dollars costs and disbursements.

---

MARGARET E. CLARK, Respondent, v. EDWARD TRACY SCOVILL and FRED W. NOYES, as Executors, etc., of JOHN HYLAND, Deceased, Appellants.

Fourth Department, January 17, 1906.

**Executors and administrators — consent that claim against estate be determined by surrogate — when action on claim barred by such consent.**

When a claimant against an estate, whose claim has been rejected, has by agreement with the executors filed a consent that the claim be determined by the surrogate on the final accounting pursuant to section 1822 of the Code of Civil Procedure, such claimant cannot maintain an action at law on the claim after

the six months' Statute of Limitations has run. The claimant is restricted to the mode of trial agreed upon.

*It seems*, that if the executors neglect unreasonably to account, such claimant may compel an accounting under section 2727 of the Code of Civil Procedure, or the surrogate may compel the accounting on his own motion under section 2726 of said Code.

APPEAL by the defendants, Edward Tracy Scovill and another, as executors, etc., of John Hyland, deceased, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Steuben on the 26th day of May, 1905, sustaining a demurrer to two defenses contained in the answer.

*Peck & Whitbeck*, for the appellants.

*Charles W. Stevens* and *Charles D. Newton*, for the respondent.

WILLIAMS, J. :

The judgment should be reversed, with costs, and judgment entered overruling the demurrer, with costs.

The action is upon a promissory note, alleged to have been made by defendants' testator. The defendants deny the making and delivery of the note, set up the six months' Statute of Limitations, and in the two defenses demurred to allege the following facts :

September 17, 1900, the plaintiff presented her claim upon the note against the estate. October 26, 1900, the claim was disputed and rejected by defendants. March 15, 1901, the defendants filed with the surrogate a written consent that the said claim be heard and determined by him upon the judicial settlement of their accounts as executors, and March 22, 1901, the plaintiff filed a like consent with the surrogate. These consents were filed pursuant to section 1822 of the Code of Civil Procedure. After the filing of these consents it was mutually stipulated by the parties in the Surrogate's Court that the trial of the claim be had before the surrogate before the judicial settlement. Pursuant to such stipulation the trial was had, and on May 31, 1902, the surrogate decided the note was not made by the testator, was a forgery, and disallowed the claim with costs. June 14, 1902, a judgment was entered upon this decision. An appeal was taken from such judgment to the Appellate Division of the Supreme Court, where, November 17, 1903,

App. Div.:]

Fourth Department, January, 1906.

the judgment was reversed on the ground that the surrogate had no jurisdiction to hear and determine the claim, except upon the judicial settlement of the executors' accounts. (*Matter of Clark v. Hyland*, 88 App. Div. 392.) Upon this decision, July 5, 1904, a judgment was entered and the matter remitted to the Surrogate's Court for such further proceedings as might be proper. No proceedings have ever yet been instituted for a judicial settlement of the executors' accounts.

This action was commenced January 3, 1905. The defense of the six months' Statute of Limitations is fatal to the maintenance of this action unless the time has been extended by the filing of the consents under section 1822 of the Code. The provision of that section is that the claimant must bring her action within six months after the rejection of the claim unless the consents are filed. The consents are inoperative unless filed by both parties. When they are so filed the plaintiff may wait until the judicial settlement is had without any Statute of Limitations affecting her, and may then have her claim tried and determined. The consents when filed operate as an agreement between the parties avoiding the six months' Statute of Limitations and giving the surrogate jurisdiction which he would not otherwise have to hear and determine the claim.

The claimant cannot abandon her agreement by selecting some other court for the enforcement of her claim and still retain the benefit of the extension of the limitation beyond the six months. She has attempted to relieve herself from that agreement by bringing this action in the Supreme Court and, therefore, the six months' statute is in force, and she cannot recover. She has no other remedy to enforce her claim except to submit the same to the Surrogate's Court on the judicial settlement of the executors' accounts.

It is said that this conclusion should not be arrived at because it leaves the claimant at the mercy of the executors; that she cannot apply for such settlement, and the executors may neglect to do so for years or for all time. The answer to this proposition is that section 2727 of the Code of Civil Procedure provides that the judicial settlement may be instituted upon the petition of a creditor. It does not provide that the creditor's claim must be admitted or established. Formerly it was held that only a creditor whose claim had been admitted or established could institute the proceeding, but the

reason for such holding was that the surrogate had no jurisdiction to try or determine a disputed claim, and until the claim was admitted or established by some other competent court, the surrogate could not entertain the proceeding because it could not be known, until the claim was established, that the creditor had any interest in the estate or would be entitled to share in the disposition of the estate. (*Matter of Whitehead*, 38 App. Div. 319.)

Under sections 1822 and 2743 of the Code of Civil Procedure, however, upon the filing of the consents, the surrogate is vested with jurisdiction upon the judicial settlement, to try and determine the claim, and can then settle the question whether the claimant has such interest and is entitled to share in such distribution. Nor can it be doubted that if the executors unreasonably refuse to institute the proceedings for a final settlement upon request of the claimant, and the claimant cannot herself commence the same, the claimant can obtain relief in Surrogate's Court, or certainly in the Supreme Court, from the effect of the agreement made by the consents, so as to retain the benefit of the extension of the six months' limitation.

We have no doubt, however, that the claimant can herself institute the proceeding. Very likely the surrogate can, of his own motion, initiate the proceedings under section 2726 of the Code of Civil Procedure, and if he can he will certainly do his duty and so protect the claimant against unnecessary and unlimited delay.

We conclude that the defenses demurred to are fatal, if established, to plaintiff's right to maintain this action.

All concurred; NASH, J., not sitting.

Interlocutory judgment reversed, with costs, and demurrer overruled, with costs.



HUGH H. SENIOR, Appellant, v. NEW YORK CITY RAILWAY COMPANY,  
Respondent.

First Department, February 9, 1906.

**Street surface railways — ownership by one corporation of majority of stock of another corporation not a control thereof under section 101 of the Railroad Law — penalty under section 39 of the Railroad Law — when action for such penalty does not lie against corporation owning majority of stock of other corporation.**

The fact that one street surface railway corporation owns the majority of the stock of a similar corporation having a separate and distinct management, and thus might be able indirectly to control the management by the election of directors in such other company, does not constitute a control of such other corporation within the meaning of section 101 of the Railroad Law (as amd. by Laws of 1897, chap. 688), which prohibits such corporation from charging more than five-cent fares.

Hence, one who has been a passenger on the cars of said corporation owning the majority of the stock in the other corporation, and has paid a five-cent fare, cannot sue said corporation to recover the penalty for an overcharge in fares under section 39 of the Railroad Law, because he has been refused a transfer entitling him to ride on the cars of the other corporation, and has by it been compelled to pay another five-cent fare.

The "control" of railroad lines contemplated by said section 101 of the Railroad Law means a control of the operation of the road and not merely a control of the corporation or individuals who operate it by reason of the ownership of a majority of the stock.

O'BRIEN, P. J., and CLARKE, J., dissented, with opinions.

APPEAL by the plaintiff, Hugh H. Senior, from an order of the Appellate Term of the Supreme Court, entered in the office of the clerk of the county of New York on the 26th day of June, 1905, as resettled by an order entered in said clerk's office on the 16th day of August, 1905, affirming a judgment of the Municipal Court of the city of New York in favor of the defendant, dismissing the complaint upon the merits.

*Hampton D. Ewing*, for the appellant.

*Adrian H. Joline*, for the respondent.

INGRAHAM, J. :

The plaintiff was a passenger upon the defendant's railroad on Lexington avenue. At Forty-second street he requested a transfer

from the Lexington avenue line entitling him to ride upon the Forty-second Street, Manhattanville and St. Nicholas Avenue railway so as to carry the plaintiff over that road without the payment of additional fare. This demand was refused. Plaintiff then boarded the Forty-second street car, but was required to pay his fare, and he brings this action to recover the penalty imposed by section 39 of the Railroad Law (Laws of 1890, chap. 565) for a violation of section 101 of said statute (as amd. by Laws of 1897, chap. 688). The complaint alleges that the railroad on Forty-second street was operated by the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, and that the conductor thereof was in the employ of the said company and one of its servants; that the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company is a street surface railroad corporation, organized under the laws of the State of New York for the purpose of building, maintaining and operating a road through, upon and along certain streets, avenues and places in the city of New York, and had an authorized capital stock of \$2,500,000, consisting of 25,000 shares of \$100 each; that the defendant, the New York City Railway Company, was the owner of an amount in excess of ninety per cent of the total shares of the capital stock of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, and that by reason thereof it controlled and managed, through the directors and officers of said Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, the affairs of said company and said railroad of said company on Forty-second street, and that the refusal of the defendant to give the plaintiff a transfer over the said line of street railway on Forty-second street and to carry the plaintiff on said line over Forty-second street without the payment of additional fare was in violation of section 101 of the Railroad Law of the State of New York, and that by virtue of the provisions of the said section and also of the provisions of section 39 of the said law the defendant has become, and now is, indebted to the plaintiff in the sum of fifty dollars.

The answer of the defendant admits that it is the owner of 24,698 shares of the capital stock of the Forty-second Street Railroad Company, but that of such stock 16,711 shares are held by the Morton

App. Div.]

First Department, February, 1906.

Trust Company, subject to the authority expressed in a certain mortgage made by the Third Avenue Railroad Company to the Morton Trust Company, as trustee, bearing date May 15, 1900; denies that by reason of such stockholding it controlled or managed through the directors or officers of the Forty-second Street Company, or otherwise, the affairs of said company or said railroad of said company on Forty-second street, but, on the contrary, alleged that the entire control, management and operation of said railroad was under the power of the board of directors duly elected by the stockholders of the company and of the officers elected and appointed by such board; further denying that the said street surface railroad on Forty-second street and the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company was under the control of the defendant.

Upon the trial it was proved that on the 25th day of June, 1900, the Third Avenue Railroad Company was the owner of 16,646 shares of the capital stock of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company; that on that day this stock was transferred to the Morton Trust Company, as trustee, and held by it subject to the provision of a mortgage made by the Third Avenue Railroad Company, and that there was subsequently transferred to the Morton Trust Company, as trustee, 55 additional shares of the stock of the said company, making a total of 16,701 shares which were held by the trust company. There was offered in evidence a lease from the Third Avenue Railroad Company to the Metropolitan Street Railway Company, dated April 13, 1900, by which the Third Avenue Railroad Company leased for 999 years its road extending from Park Row and Broadway, through Park Row, the Bowery and Third avenue to the Harlem river, and also a line upon One Hundred and Twenty-fifth street, with certain real estate, and also "all easements, fixtures, personalty and property of every description of the party of the first part," which property included the 16,701 shares of the stock of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company held by the trust company, being a majority of the capital stock of the company.

It was also stipulated that in addition to the 16,701 shares held by the Morton Trust Company, as trustee, 7,545 shares of the stock

of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company were on the 16th day of December, 1902, acquired by the Metropolitan Street Railway Company and afterwards by the defendant, and this stock was thus held prior to the commencement of the action.

On behalf of the defendant the president of the Forty-second Street Company was called as a witness and testified that he had been president of the company since March, 1900, elected each year at the annual meeting of the stockholders; that he was operating the road prior to March, 1900, as superintendent; that in March, 1900, the road went into the hands of a receiver and was in the possession of a receiver about a year and four months; that at the termination of the receivership the witness was president of the road, and that since then the road has been operated and controlled by the directors and officers of the road; that the proceeds from the operation of the road were deposited in a bank in the name of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company; contracts for supplies are all made by him as president and the bills are paid by him out of the receipts from the operation of the road; that there was no physical connection between the two roads. The cars of the defendant line are not run over the tracks of the Forty-second Street Company and the cars of the Forty-second Street Company are not run over any of the tracks of the defendant corporation, and the tracks of the two roads were not connected. None of the directors of the defendant road were directors of the Forty-second Street Company. From the facts thus established it would seem that these two corporations are entirely distinct, managed by different officers and directors and the roads are operated as distinct and independent lines.

There are existing between the roads no contract relations of any kind; the plaintiff, however, claims that the defendant was bound to issue a transfer which would entitle him to a continuous ride over the defendant's road and over the Forty-second street road, as the defendant had the ownership of a majority of the stock of the Forty-second street road which operated and controlled its own railroad. A majority of the stock of the Forty-second Street Company was held by the Morton Trust Company as trustee to secure certain bonds issued by the Third Avenue Railroad Company who, at the

App. Div.]

First Department, February, 1906.

time of the issuance of these bonds, was the owner of this stock, but under the mortgage the Third Avenue Railroad Company had reserved the right to vote on this stock at the election of the directors of the company so long as there was no default in the payment of the interest or principal of the bonds to secure which the stock was pledged to the Morton Trust Company. So that at the time of the demand for a transfer by the plaintiff the defendant had the right to vote upon a large majority of the stock of the Forty-second Street Company and thus could, by means of its voting power, elect such persons trustees as it wished. It would seem that the minority stockholders of the Forty-second street road could have objected to the officers of that company carrying passengers over its road because they had paid a fare upon the defendant road. The Forty-second street road had secured no advantage because of the acquisition by the defendant of a majority of the stock of the Forty-second street road; nor was the Forty-second street road in any way bound to accept a transfer issued by the defendant as fare upon its road if one had been issued by the defendant. There was no contract, lease or arrangement of any kind between the two corporations. The Forty-second Street Company had never accepted a benefit under the Railroad Law by which there was imposed upon it the obligation to carry a passenger without payment of fare because such passenger had paid a fare upon the defendant's road. The liability for this penalty for which the plaintiff sues must depend upon the failure of the defendant corporation to perform some duty imposed upon it by law. The refusal of the officers and employees of the Forty-second street road to permit the plaintiff to ride upon its line without paying the legal fare was not the violation of a duty imposed upon the defendant, unless it in some way was bound to compel the Forty-second street line to transport a passenger without payment of fare because he had paid the legal fare to the defendant for a ride on its road. The only way that the defendant could have controlled the Forty-second street line was that at the next annual election it could have elected directors who would obey the orders of the defendant. If orders had been given by the defendant corporation to the Forty-second street road to carry its passengers without payment of fare, the minority stockholders would have had the right to object and to hold the directors

and officers of the Forty-second Street Company to account for failing to perform their duties for the benefit of the Forty-second Street Company.

Keeping in mind the relation between the two companies, I think that section 101 of the Railroad Law, under which the plaintiff seeks to recover, does not apply. Section 101 of the Railroad Law is a part of article 4, relating to street surface railroads. That section, as amended by chapter 688 of the Laws of 1897, provides: "No corporation constructing and operating a railroad under the provisions of this article, or of chapter two hundred and fifty-two of the laws of eighteen hundred and eighty-four, shall charge any passenger more than five cents for one continuous ride from any point on its road, or on any road, line or branch operated by it, or under its control, to any other point thereof, or any connecting branch thereof, within the limits of any incorporated city or village." Section 39 of the Railroad Law provides that "any railroad corporation which shall ask or receive more than the lawful rate of fare \* \* \* shall forfeit fifty dollars, to be recovered with the excess so received by the party paying the same," and the plaintiff claims that the defendant received more than the lawful rate of fare because the Forty-second Street Company required him to pay a fare after he had paid the defendant his fare on the Lexington avenue line, and thereby incurred this penalty.

The defendant was authorized to charge five cents to ride upon its line of railway. It demanded and received from the plaintiff five cents as his fare upon the Lexington avenue car. When he got out of that car and got upon the line of the Forty-second Street Company, the employee of that company demanded and received from him five cents for a ride upon that line. It would seem that this defendant has not charged or received more than one fare. There is no evidence that the defendant profited in any way by the fare that was paid to the Forty-second street road, or that it had authorized or directed that company to charge or receive fare from the plaintiff for using its line. It had directly nothing to do with asking or receiving the fare that was demanded by the employee of the Forty-second Street Company. It could not carry the plaintiff upon the line of the Forty-second Street Company, for it did not operate that line and had no direct control over its operation, and

App. Div.]

First Department, February, 1906.

the defendant did not ask or receive any fare for transporting the plaintiff over the Forty-second street line.

Section 101 of the Railroad Law (as amd. *supra*) provides that "No corporation constructing and operating a railroad \* \* \* shall charge any passenger more than five cents for one continuous ride from any point on its road, or on any road, line or branch operated by it, or under its control, to any other point thereof, or any connecting branch thereof, within the limits of any incorporated city or village." Before a street surface railroad company violates this act it must charge a passenger more than five cents for a passage over its road, or a road, line or branch operated by it or under its control, within the limits of an incorporated city or village. Assuming that the Forty-second Street Company may in a sense be said to be under the control of the defendant because it owns a majority of the stock of the corporation, still the defendant would not be guilty of charging excessive fare unless it charged a passenger for a ride over the connecting road. The evidence is undisputed that the defendant made no such charge, but it seems to me that the operation or control of a road here spoken of necessarily means the control of the operation of the road, and not merely a control of the corporation or individuals who operate it. A person owning a majority of stock in a corporation cannot be said to be in control of the management of the property of the corporation. He has a control over the corporation so far as he has the power to elect its directors, but the corporation is itself a person and such corporation actually owns and controls its property. The provision here does not relate to the control of the corporation by its stockholders, but to the control of the operation of a railroad by those charged with that duty, as distinguished from the control of a person who operates the railroad. It would be quite absurd to speak of a person owning a majority of the stock of a corporation as being the owner of the property, or as controlling the use to which the property should be put. He may be said in a sense to control the corporation, but the corporation itself owns its property and controls and manages it; and it seems to me that the word "control," as used in section 101 of the Railroad Law (as amd. *supra*) in connection with the word "operated," as applying to a corporation which operates or controls another road, applies to the direct operation or

control of the operation of the specific railroad sought to be brought within the provisions of the act, and not to the indirect control over a corporation which owns the road by its stockholders. Each street surface railroad corporation operating or controlling a railroad is entitled to charge five cents for one continuous ride from any point on its road, or on any road, line or branch operated by it, or under its control, within the limits of an incorporated city or village; and the Forty-second street road was entitled to charge the plaintiff five cents for a ride upon its road, operated and controlled by it, and the defendant was authorized to charge the plaintiff five cents for a ride on its road, operated or controlled by it, and this is just what these two corporations did. There was, therefore, as I view it, no excessive fare charged or paid, and the Municipal Court was quite right in refusing to award the plaintiff a judgment.

It follows that the determination appealed from should be affirmed, with costs.

LAUGHLIN and HOUGHTON, JJ., concurred; O'BRIEN, P. J., and CLARKE, J., dissented.

CLARKE, J. (dissenting):

I dissent. The statute imposes a duty to the public on corporations which derive all their powers and privileges from the people of the State, and should be liberally construed in the public interest. When either of two constructions of a statute is possible, "the interpretation must be adopted which is most favorable to the State." (Mr. Justice HARLAN, in *Coosaw Mining Co. v. South Carolina*, 144 U. S. 550, 561; cited with approval in *Minor v. Erie R. R. Co.*, 171 N. Y. 573; *O'Reilly v. Brooklyn Heights R. R. Co.*, 95 App. Div. 261; *affd.*, 179 N. Y. 450.) "This is a statute extending the rights of the individual and 'to the end that public convenience may be promoted' and is to be liberally construed and strictly enforced to accomplish these objects," said Mr. Justice WOODWARD in *Jenkins v. Brooklyn Heights R. R. Co.* (29 App. Div. 8), construing section 105 of chapter 565 of the Laws of 1890, as renumbered section 104 and amended by chapter 676 of the Laws of 1892, in regard to transfers. In *Griffin v. Interurban St. Ry. Co.* (179 N. Y. 447) Judge BARTLETT said: "In some of the cases in the lower courts, in construing section 104 in regard to the



App. Div.]

First Department, February, 1906.

liability of companies under lease to grant transfers to passengers, the meaning of the words in that connection, 'to the end that the public convenience may be promoted by the operation of railroads embraced in such contract substantially as a single railroad with a single rate of fare,' have been construed as a legislative intimation that certain transfers might be demanded that would not be required in seeking to promote the public convenience. In the cases before us this language establishes the propriety of the transfers demanded."

It appears that if one road operates or controls another by contract or by lease, the transfers are demandable. Is it not the intention that if these intramural transportation companies, enjoying the enormous advantages of public franchises in the public streets, combine—in any way—as a consideration therefor they shall grant to the public continuous trips at a single fare? We cannot close our eyes in these days of great combinations of capital to the facts in regard to street railway matters in New York city. We cannot be blind to the practical result of open facts. It is in evidence here that the defendant, the New York City Railway Company, owns 24,698 shares of the 25,000 shares of the capital stock of the Forty-second Street Company. While it is true that each company has a separate board of directors, yet they have a common treasurer. It seems to me a technical, narrow and unreasonable construction to hold that, within the meaning of this statute, the defendant does not control the Forty-second Street Company. Speaking after the manner of men, how long would the nominal board of directors of that company remain in office if they ran counter to the wishes or directions of the owner of ninety-nine per cent of the stock? The very title papers of the defendant express this relationship of control where one company owns a sufficient amount of the stock of another. The indenture between the Third Avenue Railroad Company and the Metropolitan Street Railway Company of April 13, 1900, uses this language: "And whereas, the party of the first part is the lawful owner of the following amounts of the capital stock of the following named railroad companies (hereinafter referred to as 'Controlled Companies'), all of which are operating or were organized to operate street railroads in said City of New York," etc., and among these is the stock of the Forty-second Street Railroad Company,

and throughout the lease it is referred to as a "controlled company." In the mortgage from the Third Avenue Railroad Company to the Morton Trust Company the same language is used. There seemed to have been no doubt in the minds of the draftsmen of those instruments, or of the officers who executed them, as to whether the ownership of the stock did not carry with it the control of the company.

In *Farmers' Loan & Trust Co. v. New York & Northern R. Co.* (150 N. Y. 410, 425) it was said: "The clear and legitimate inference to be drawn from the circumstances proved in this case is that after the New York Central and Hudson River Railroad Company purchased a majority of the stock and bonds of the New York and Northern Railway Company, it controlled its officers and directors as fully and completely as though they had been elected by its votes. \* \* \* Indeed, it is a matter of common knowledge that where the ownership of a majority of the stock of such a corporation changes, the board usually changes, unless its members are already in harmony with the policy of the purchasers." In *Pearsall v. Great Northern Railway* (161 U. S. 646), in considering acts of the Legislature of Minnesota prohibiting railroad corporations from consolidating with, leasing or purchasing, or in any other way becoming the owner of or controlling any other railroad corporation, or the stock, franchises or rights of property thereof having a parallel or competing line, Mr. Justice Brown said: "As the Northern Pacific road also controls, by its own construction and by the purchase of stock other roads extending from the Mississippi River to the Pacific Ocean, \* \* \* the fact that one-half of the capital stock of the reorganized company is to be turned over to the shareholders of the Great Northern, which is, in turn, to guarantee the payment of the reorganized bonds, is evidence of the most cogent character to show that nothing less than a purchase of a controlling interest, and practically the absolute control, of the Northern Pacific is contemplated by the arrangement. With half of its capital stock already in its hands, the purchase of enough to make a majority would follow almost as a matter of course, and the mastership of the Northern Pacific would be assured."

In *United States v. Northern Securities Co.* (120 Fed. Rep.

721) the court was construing a public statute. There, as in the case at bar, the subsidiary companies had complete organizations and kept up completely their separate entities. The Circuit Court said: "It will not do to say that so long as each railroad company has its own board of directors, they operate independently and are not controlled by the owner of the majority of their stock. It is the common experience of mankind that the acts of corporations are dictated and that their policy is controlled by those who own the majority of their stock. Indeed, one of the favorite methods in these days, and about the only method, of obtaining control of a corporation, is to purchase the greater part of its stock. \* \* \* So long as directors are chosen by stockholders, the latter will necessarily dominate the former, and in a real sense determine all important corporate acts." On appeal to the Supreme Court (193 U. S. 328) the court said: "The Circuit Court was undoubtedly right when it said — all the judges of that court concurring — that the combination referred to 'led inevitably to the following results: *First*, it placed the control of the two roads in the hands of a single person, to wit, the Securities Company, by virtue of its ownership of a large majority of the stock of the companies.'" Mr. Justice BREWER, concurring, in speaking of the Northern Securities Company, said: "It is an artificial person, created and existing only for the convenient transaction of business. In this case it was a mere instrumentality by which separate railroad properties were combined under one control."

My conclusion is that the defendant controls the Forty-second street road as much as if the boards of directors were identical, as if it had a lease or a traffic contract or owned every share of the stock. The determination of the Appellate Term should be reversed.

O'BRIEN, P. J., concurred.

LAUGHLIN, J. (concurring):

By permitting one street railway corporation to own a controlling interest in the stock of another, competition is more or less stifled, and it would seem that there should be an interchange of transfers so that passengers may make a continuous journey in one general direction over both lines for a single fare. The remedy, however,

must be found in the Legislature. It will not, in my opinion, do for the courts to hold that the directors elected by the corporation owning a majority of the stock are subservient to that corporation, and are in all cases justified in carrying out its wishes so that it may be said to control the other corporation.

Determination affirmed, with costs.

---

ALFRED URBANSKY, Appellant, v. GEORGE P. SHIRMER and MICHAEL J. HAND, Respondents.

First Department, February 9, 1906.

**Specific performance — when prior false representations of plaintiff waived by defendant — when promise to assign mortgage shown by promise to deliver same — adequate remedy at law not pleaded — tender — when plaintiff not bound to accept offer to return consideration.**

When, in an action for the specific performance of a contract to assign a mortgage, it is shown that though the defendant had made a former agreement to execute releases of said mortgage on the false representation of the plaintiff that he was the owner of the mortgaged premises, the defendant, subsequent to the discovery of the fraud, has agreed to assign the mortgage and has accepted the consideration, there is a waiver of the prior fraud of the plaintiff and he is entitled to specific performance or damages for a breach of contract. A promise by the holder of a mortgage on delivering a release thereof that he will also deliver the bond and mortgage when he finds it, is an agreement to assign the same, for title to a bond and mortgage can pass by delivery.

In an action for specific performance, the defense that the plaintiff has an adequate remedy at law must be pleaded to be available.

In such action the plaintiff is not bound to accept a tender by the defendant of the consideration paid, but may insist upon specific performance or damages for the breach of the contract.

APPEAL by the plaintiff, Alfred Urbansky, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 28th day of January, 1905, upon the decision of the court, rendered after a trial at the New York Special Term, dismissing the complaint upon the merits.

*Isaac L. Miller*, for the appellant.

App. Div.]

First Department, February, 1906.

*Oscar C. Kunze*, for the respondent Shirmer.*Roswell H. Carpenter*, for the respondent Hand.

INGRAHAM, J. :

The facts in this case are peculiar. The plaintiff for some reason was desirous of obtaining the assignment of a bond and mortgage held by the defendant Shirmer on certain property in the city of New York owned by the defendant Hand. The plaintiff testified that he met Shirmer in the month of June, 1904, and told him that as the first mortgages on the lots at Baychester and Pelham Park on which he (Shirmer) held second mortgages were being foreclosed, his second mortgages would be wiped out, and, "providing he would take little for any of his mortgages, I would probably consider buying them." Shirmer asked the plaintiff if he knew the particular lots he referred to; plaintiff replied no, but that he would let him know by letter. Subsequently plaintiff sent Shirmer a letter, dated June 3, 1904, as follows:

"DEAR SIR.—The lots I referred to when I spoke to you to-day are as follows:" (Then a number of lots are named, and the letter continues): "Now kindly state the lowest possible figure on each bunch separate, and if your figures are low enough it will not take me long to let you know what can be done."

In reply to this letter the defendant Shirmer wrote to the plaintiff on June eighth, as follows:

"DEAR SIR.—I submit the following:" (and there follow a number of lots; the lots in question being lots 5 to 10, inclusive,) "release price \$640; will take cash now \$500."

In reply the plaintiff wrote to the defendant that he would buy the third parcel or bunch, which included lots 5 to 10 inclusive, for \$225 and that he would be ready to pay in cash before the fifteenth instant. Subsequently to this letter the defendant called upon the plaintiff and said he wanted \$500, to which plaintiff replied that it was no use talking, that he had given the figures he would pay, and in case defendant wanted that, very well and good, and if not, to drop the matter. Subsequently an agreement resulted, the plaintiff paid the defendant \$25, and the defendant made out and delivered to plaintiff a memorandum, as follows:

“\$25.00

N. Y., June 10, 1904.

“Received of Alfred Urbansky, Twenty-five dollars on account of Three hundred and twenty-five dollars to be paid in full for release of lots 5, 6, 7, 8, 9, 10, 35, 36 and 37, Block 32, Baychester, from lien of second mortgage to be closed on or before June 15, 1904, at 104 East 32nd St., at 10 A. M.

“GEO. P. SHIRMER.”

This agreement was carried out on June fifteenth by the plaintiff paying to the defendant the balance of the \$225, when he received from Shirmer a satisfaction piece of the mortgage covering these six lots. The plaintiff testified that when this satisfaction piece was tendered to him he stated that he was not looking for a satisfaction piece, that he wanted an assignment, and that Shirmer said that he did not bargain to give an assignment; that the agreement called for a release and that he did not know that those lots were separate, that it was a separate mortgage. Plaintiff testified that at this conversation Shirmer promised to give the plaintiff an assignment if he wanted it and agreed to deliver the bond and mortgage to plaintiff. The plaintiff accepted the satisfaction piece and paid the balance, \$200. At the same time Shirmer gave the plaintiff a receipt, dated June 15, 1904, as follows:

“Received of Alfred Urbansky the sum of Two hundred and twenty-five dollars for satisfaction piece of Mtg. upon lots 5 to 10 inclusive, Block 32, Baychester.

“GEO. P. SHIRMER.”

It was also proved that on the 14th day of June, 1904, the day before the payment of the \$200 and the delivery of the satisfaction piece, Shirmer executed an assignment of this mortgage and bond to Hand, the owner of the property, which was recorded on the twentieth day of June. There was also introduced in evidence an agreement between Shirmer and Hand dated June twentieth, which recited the delivery of the satisfaction piece of the mortgage to the plaintiff and the payment by the plaintiff of \$225, and it was agreed that \$225 of the \$450 that Hand paid for the assignment of the mortgage should be deposited to pay any and all expenses of any litigation that might arise by reason of the giving of the said satisfaction piece.

App. Div.]

First Department, February, 1906.

Plaintiff having rested, Shirmer testified on his own behalf that the plaintiff called upon him and claimed to be the owner of the lots and wanted to obtain a release of these six lots, and that in consequence of the statement of the plaintiff that he was the owner of the lots, the arrangement about this satisfaction piece was made; that between the tenth and fifteenth of June the plaintiff wrote to Shirmer asking for an assignment of the mortgage on these six lots which Shirmer refused to give; that he saw the plaintiff on the thirteenth and at that time plaintiff stated that he wanted an assignment and not a release, to which Shirmer replied that he would not give it, as he had not agreed to give it, and would only give what he agreed to give. Plaintiff said he was not satisfied with that and wanted an assignment. Shirmer then said, "very well, we had better call the transaction off; I will return the money to you and enough in addition to pay you for your trouble, and we will cancel the agreement." After this interview, on June fourteenth Shirmer had an interview with the defendant Hand, the owner of the lots covered by the mortgage, and then gave Hand an assignment of the mortgage covering these six lots. After giving the assignment of the mortgage to Hand on the fourteenth, Shirmer gave a satisfaction of the mortgage to the plaintiff on the fifteenth. Subsequently Shirmer testified that it was on the twentieth that he delivered the assignment to the defendant Hand, having before that received \$225 from the plaintiff for which he had given him a satisfaction of the mortgage, and that he promised to give to the plaintiff the bond and mortgage in case he found them.

After the testimony was in the court announced that it would give judgment in favor of the plaintiff, and adjourned the trial until the following Monday, when the defendant Shirmer appeared in court and tendered to the plaintiff the sum of \$225 that he had received from him and which plaintiff refused to accept, whereupon the court found that the making of this agreement whereby the defendant agreed to release to the plaintiff these six lots from the lien of the mortgage for the sum of \$225 was based upon representations made by the plaintiff that he was the owner of the lots, and that the plaintiff also falsely and fraudulently stated and represented that he was making or had made arrangements with the owner of a prior mortgage covering said lots to secure a release of

said lots from the lien of said mortgage; that the defendant Shirmer believed the said representations of the plaintiff to be true, and relied thereon, and was thereby induced to execute and deliver said agreement to release said lots from the lien of said mortgage; that between the tenth and fifteenth days of June it was discovered that the lots had been released from the prior mortgage and that the mortgage covering the said six lots was a separate mortgage; that thereupon, and before the defendant Shirmer learned that the aforesaid representations made by the plaintiff were not true, the defendant Shirmer, believing the said representations to be true, was induced to modify said agreement and to substitute a satisfaction piece of said last-mentioned mortgage in the place and stead of a release as to the said lots so numbered 5 to 10, inclusive; that on June fifteenth Shirmer informed the plaintiff that the representations made by the plaintiff to Shirmer were false and thereupon Shirmer offered to cancel said agreement and tendered to said plaintiff in cash the amount of money paid by the plaintiff on account thereof, but that plaintiff refused to cancel said agreement or to accept the money tendered and demanded an assignment of the said mortgage, which the defendant Shirmer refused to give; that thereupon the plaintiff threatened the defendant Shirmer with a suit if he failed to carry out said agreement, and the defendant Shirmer, because of such threat, thereupon delivered to the plaintiff the satisfaction piece of said mortgage of defendant Hand and wife, and said plaintiff accepted said satisfaction piece in full settlement and satisfaction of said agreement between plaintiff and defendant Shirmer, and paid the defendant Shirmer the amount required to be paid under said agreement, viz., \$200; that thereafter and on the 20th day of June, 1904, defendant Shirmer, at the request of the defendant Hand, who was then and still is the owner of the said lots, by an assignment in writing bearing date on that day, assigned and transferred to the said defendant Hand all his interest in the said mortgage given by said Hand and his wife to said defendant Shirmer, and received from said defendant Hand for the same the sum of \$440, and that at the time of the delivery of the said assignment the defendant Hand had full knowledge of the delivery of the said satisfaction piece from the defendant Shirmer to the plaintiff. And as a conclusion of law the court found that by reason of the fraud



App. Div.]

First Department, February, 1906.

the plaintiff was not entitled to any judgment in his favor; whereupon judgment was directed in favor of the defendants, with separate costs against the plaintiff.

It is evident that this judgment cannot be sustained on the ground that the contract was avoided by reason of the fraudulent representations made to the defendant when, after the defendant Shirmer knew that the representations were false, instead of repudiating the contract, he carried it out and received the balance of the consideration which the plaintiff had agreed to pay. Assuming that the original agreement for the release of this mortgage was induced by fraudulent representations, upon the discovery of the fraud the defendant had the right to repudiate the contract and refuse to be bound by it, but also had the right to carry it out. His attempted repudiation having been refused by the plaintiff, he then accepted the consideration paid by the plaintiff for the completion of the contract, and he was then bound by it. The plaintiff swears that the defendant agreed to assign these mortgages, but the correspondence somewhat negatives this testimony, as by the writings all that the defendant agreed to do was to release the mortgage upon these lots. The defendant Shirmer according to his own testimony, after he had knowledge that the representations were false, delivered the satisfaction piece to plaintiff, received the \$200, and agreed to deliver the bond and mortgage when he found it. A delivery would be a transfer of the bond and mortgage, and if this agreement for which Shirmer received \$225 had been carried out, it would vest in the plaintiff a valid title to the bond and mortgage. Hand was informed of this agreement with the plaintiff, and received from the defendant Shirmer an assignment of the bond and mortgage, although the original bond and mortgage itself do not seem to have been delivered. The defendant Hand's right to the mortgage was, therefore, subject to the plaintiff's right, whatever it was, under his agreement with Shirmer. It seems to me, on the undisputed evidence, that the plaintiff was entitled to a transfer of this bond and mortgage. The conceded agreement of Shirmer to execute a release or satisfaction piece of the mortgage and to deliver the bond and mortgage when he found them would vest in the plaintiff a good title to the bond and mortgage, and as the plaintiff stood upon his

rights under that agreement there is no reason why he is not entitled to a specific enforcement of it.

The only real defense that the defendant would have was one not pleaded or taken on the trial, and this was that the plaintiff had a complete remedy at law by an action for the damages sustained by a breach of the contract in failing to deliver the bond and mortgage. In such a case he would have been entitled to recover the value of the bond and the mortgage which would presumably be its face value; but that defense was not pleaded and the case was not tried on that theory. If that point had been taken on the trial the plaintiff then would have been entitled to have the action continued as one at law to recover his damages, and if the defendant demanded a jury trial, sent to the Trial Term for that purpose to be tried. The effect of this judgment is that the plaintiff was not entitled to recover under the contract, as it was obtained by fraudulent representations, but as Shirmer had, after full knowledge of the fraudulent representations, affirmed the contract when it was sought to be enforced, he was not entitled to have the complaint dismissed upon that ground. The plaintiff was not bound to accept in discharge of his right to enforce the contract the amount that he had paid to Shirmer, but was entitled to insist that the contract should be either specifically enforced or that he recover the damages sustained by him by reason of Shirmer's refusing to perform it.

It follows that the judgment appealed from should be reversed and a new trial ordered, with costs to the appellant to abide the event.

O'BRIEN, P. J., McLAUGHLIN, LAUGHLIN and CLARKE, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

SIMON UHLFELDER, Appellant, v. THE PALATINE INSURANCE COMPANY, LIMITED, OF MANCHESTER, ENGLAND, Respondent.

First Department, February 9, 1906.

**Fire insurance—when mortgagor who bids in property on foreclosure entitled to indemnity for loss accruing prior to delivery of deed—measure of damages when mortgagee assigns part interest in bid before loss by fire.**

On the execution of a mortgage the title remains in the mortgagor, and the mortgagee, though he bid in the property on foreclosure, has merely a lien until such time as a formal conveyance by the referee vests him with title.

Hence, when such mortgaged property is insured, "loss, if any, payable to \* \* \* mortgagee as interest may appear," and it is provided that the insurance shall not be invalidated by foreclosure or other proceedings or notice of sale, nor by any change in the title, such mortgagee is entitled to be indemnified for damage to his interest as mortgagee by a fire which occurred after the date he had bid in the property on foreclosure, but before the delivery of the deed by the referee.

*It seems*, that had the property been bid in before the fire by another party, the mortgagee could not have recovered from the insurance company as the property, at its full value, would have been applied to the extinguishment of the debt.

When, however, such mortgagee, before the fire and prior to the delivery of the deed, has assigned two-thirds of his bid to others, the damage to his security by such fire is one-third of the total damage to the property. -

APPEAL by the plaintiff, Simon Uhlfelder, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 15th day of November, 1904, upon the decision of the court, rendered after a trial before the court without a jury at the New York Trial Term, dismissing the complaint upon the merits.

*Gibson Putzel*, for the appellant.

*John Notman*, for the respondent.

INGRAHAM, J. :

This action was tried before the court without a jury, the facts not being in dispute. The action is on a policy of insurance by which the defendant agreed to insure one William Reichert for the term of three years from the 5th day of March, 1900, at noon, to

the 5th day of March, 1903, at noon, against all direct loss or damage by fire to an amount not exceeding \$3,000 on a certain brick building, including all fixtures and improvements contained in or attached thereto, situated at No. 319 East Seventieth street, city of New York, loss, if any, payable to Simon Uhlfelder, mortgagee, as interest might appear, subject to clause attached. The clause attached is as follows: "Loss or damage, if any, under this policy shall be payable to Simon Uhlfelder, as mortgagee (or trustee) as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property."

The court found that on January 1, 1901, William Reichert bought from the plaintiff Simon Uhlfelder the premises 319 East Seventieth street in the city of New York, subject to a first mortgage of \$12,000 held by the New York Savings Bank, giving at the same time a purchase-money mortgage of \$5,000; and that in July, 1901, the plaintiff assigned a one-third interest in this second mortgage of \$5,000 to Emma Weinberg; that Reichert defaulted in the payment of interest on this second mortgage, whereupon the plaintiff and the said Emma Weinberg commenced an action to foreclose the said mortgage making Reichert a party defendant. In that action a judgment of foreclosure and sale of the premises was entered and in pursuance of that judgment the premises were sold at public auction on the 16th day of February, 1903, by the referee then appointed, at which sale the premises were knocked down to plaintiff by the referee for \$3,000 and the usual memorandum of sale was signed. At the time of the sale the amount due on this mortgage was \$5,410, the result of the sale being that there was a deficiency amounting to \$2,549.56. Immediately after the sale the plaintiff assigned a one-third interest in his bid to Emma Weinberg, and one-third to Isaac Heilbrun. The referee, by a deed dated March 16, 1903, conveyed the premises to the plaintiff Uhlfelder, Emma Weinberg and Isaac Heilbrun as tenants in common, the consideration being \$3,000, the amount bid at the sale. This deed was not delivered until some time in June, and was recorded June

App. Div.]

First Department, February, 1906.

23, 1903. On the morning of March 5, 1903, after the sale, but before the time fixed for the referee's deed, the building on the premises covered by the mortgage and the policy of insurance issued by the defendant was damaged by fire to the extent of \$2,900, and this action was brought to recover the damage sustained by the plaintiff as mortgagee.

The plaintiff, having prior to the fire assigned two-thirds of his interest under the bid, was entitled to receive and did receive from the referee a conveyance of an undivided third of the property. He, therefore, received an undivided third of this property, reduced in value by the amount of the loss by fire. He, therefore, sustained actual damage to the extent of one-third that the building on the property was damaged, which would be \$966.66. The court, after finding the foregoing facts, found "that the plaintiff sustained no loss or damage by the aforesaid fire to his mortgagee interest in said property, but received and was credited with, on such foreclosure sale, his full two-thirds proportion of the capacity of the mortgaged premises in their undamaged condition before the fire to respond to the mortgage debt, and the security furnished by the said property for the plaintiff's mortgage debt was fully realized by him and was in nowise affected by the aforesaid fire;" and, as a conclusion of law, "that the policy of insurance in suit only indemnified the plaintiff against any diminution by fire in the capacity of the mortgaged premises to respond to his mortgage debt, and that as the proof shows that such capacity was in nowise affected or lessened by the fire referred to, but the full consideration of the foreclosure sale before the happening of the fire having been duly paid, the plaintiff has failed to establish any loss or damage to his mortgagee interest covered by the policy in suit by the said fire," and directed judgment dismissing the complaint on the merits.

The real position in which the plaintiff found himself was that he had received in part payment of his mortgage one-third of a building that had been damaged by fire. The defendant had insured him against loss or damage by a fire to the building; but it is said that he cannot recover because the relation of the mortgagee to the property after the sale and before the formal delivery of the referee's deed had changed, and that, therefore, he sustained no damage. It seems to me, however, that the mortgagee's interest in the property

was not substantially changed in consequence of the entry of the judgment of foreclosure and the formal sale of the property by the referee. We are dealing with an actual situation which exists by reason of the legal relations between the mortgagor and the mortgagee. By the execution of the mortgage the title to the property is not transferred but remains in the mortgagor, the mortgagee having a lien on the property to secure the amount on the bond given with the mortgage. And that relation necessarily continues until by a formal conveyance by the referee under a sale the legal title passes from the mortgagor to the purchaser at the sale. As security for the mortgage debt the mortgagee has the right to resort to a court of equity and ask that the mortgaged premises be sold to pay the debt. And at that sale he has the right to purchase the property and to receive from the referee a conveyance of it, and thus he is able to secure the title to the property in satisfaction of the mortgage debt. That this right to obtain a title to mortgaged property for the amount due on the mortgage adds materially to the security of the mortgage and is an incident thereto is recognized by every one dealing in such securities.

The plaintiff, being the mortgagee, secured from the defendant, an insurance company, a policy of insurance by which the insurance company agreed to insure the mortgagor against loss or damage by fire to the mortgaged premises, "loss, if any, payable to Simon Uhlfelder, mortgagee, as interest may appear," and this insurance as to the interest of the mortgagee shall not be invalidated by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property. It is quite true, however, the mortgagee could only recover the damages he sustained in consequence of the fire to the extent of the damage to his interest as mortgagee in the premises, but for this the insurance company was responsible. The learned counsel for the defendant treats this sale as having been made to a third party so that the only interest that the mortgagee had under the sale was that the purchaser who had agreed to pay for the property should accept a deed from the referee, and if that had been the condition we would have agreed with the court below that the plaintiff as mortgagee had sustained no damage by the fire. But that was not the situation. The mortgagee had become the purchaser and was

App. Div.]

First Department, February, 1906.

entitled to a conveyance of all of the mortgaged premises which he was to receive as payment on account of the amount due on the mortgage, and thus in payment of his mortgage he was required to take a conveyance of the property. What he was to get in satisfaction of his mortgage was a conveyance of the property and the fire that damaged the property before he acquired title would be, as I view it, a direct damage to his interest as mortgagee as it reduced the value of the property that he had been required to take in satisfaction of his mortgage. It is true he completed his purchase, took title and received from the referee a deed to the property, but what he received was a deed to property damaged by fire against which the defendant had insured him, and it certainly seems to me that his interest as mortgagee in the premises, not having been actually merged or destroyed by acquiring the fee before the fire, was a direct injury to the amount of his interest in the property that he acquired in satisfaction of his mortgage.

I think this view is sustained by several decisions of the Court of Appeals in this State, although the exact question was not presented in any of them. In *Eddy v. London Assurance Corporation* (143 N. Y. 311) the loss under the policy was, as in this case, payable to the mortgagee or trustee as interest might appear, and containing also the clause that the insurance as to the interest of the mortgagee should not be invalidated by any act or neglect of the mortgagor or owner of the property or by any foreclosure or other proceedings or notice of sale relating to the property. Default having been made under the mortgage, foreclosure proceedings were commenced, and before judgment of foreclosure in the action a fire occurred; the mortgagee proceeding with the action obtained a judgment by default for the foreclosure of the mortgage, and subsequent to the fire the property was sold under the foreclosure judgment, leaving a deficiency of about \$5,000. As to the right of the mortgagee to recover from the insurance company for the loss caused by the fire, the court held that the mortgagee was acting strictly within his legal rights when he took proceedings to foreclose the mortgage, and that there was a separate and distinct insurance of the interest of the mortgagee in the premises and, "consequently, the mortgagee violated no contract on his part when he commenced the proceedings to foreclose his mortgage, and thus

endeavored to collect his debts. Before he had proceeded so far as a judgment of foreclosure a fire occurred. What was he to do? Was he bound to stay further proceedings and accept payment of the amount of his insurance and then assign to the extent of such payment his rights in the mortgages to the companies? We think not. Such is not the meaning of the clause when read as a whole. Foreclosure proceedings were not to affect his rights. This was expressly provided for and agreed to. Although there was an agreement to subrogate, yet that agreement was also upon the condition that subrogation should not impair the mortgagee's right to recover the full amount of his claims. The two rights must be considered together, and though subrogation under certain circumstances may, under the agreement, be insisted upon, yet, unless payment of his mortgage debt is made, the mortgagee must have the right to proceed with the foreclosure and to a sale of the premises, for otherwise it could not be seen whether a subrogation prior to a sale would not impair his right to recover the full amount of the claim of the mortgagee." While this case is not exactly in point, the principle underlying it is in accord with the views before expressed.

In *Haight v. Continental Ins. Co.* (92 N. Y. 51) the court said: "Nor was the policy avoided by the sale on foreclosure. There was no change of title. No deed was given, and not even a report of sale made and presented to the court for confirmation. Until then the sale and transfer of possession were inchoate and conditional, and had not become absolute and complete." (See, also, *Browning v. Home Ins. Co.*, 71 N. Y. 508; *Mutual Life Ins. Co. v. Balch*, 4 Abb. N. C. 202.) That the purchaser at a sale under foreclosure does not become the owner of the property until he receives a deed is now settled. (*Cheney v. Woodruff*, 45 N. Y. 98.)

My conclusion, therefore, is that the plaintiff's interest as mortgagee in the mortgaged premises continued until the formal delivery of the deed by the referee, in pursuance of the sale under the judgment of foreclosure, and that, the fire having occurred before the delivery of the deed, the plaintiff as mortgagee was entitled to recover the damage caused to his interest in the premises as mortgagee; that in consequence of his transferring two-thirds of his



App. Div.]

First Department, February, 1906.

interest under his bid that damage was reduced to one-third of the actual damage caused by the fire, and that was the damage directly sustained by him by reason of the impairment of the property he secured for his mortgage indebtedness. Thus, upon the facts, this plaintiff was entitled to recover one-third of the total loss of \$2,900, namely, \$966.66.

It follows that the judgment appealed from must be reversed and a new trial ordered, unless the parties waive a new trial, in which event judgment is directed for the plaintiff upon the findings of the court below for that amount, with interest and costs in this court and in the court below.

O'BRIEN, P. J., PATTERSON, CLARKE and HOUGHTON, JJ., concurred.

Judgment reversed and new trial ordered, unless the parties waive a new trial, in which event judgment directed for the plaintiff upon the findings of the court below for \$966.66, with interest and costs in this court and in the court below.

---

PERCY S. HILDRETH, Appellant, v. THE CITY OF NEW YORK,  
Respondent.

First Department, February 9, 1906.

**Municipal corporations — commissioner of highways of city of New York is without authority to employ engineer on commission to draw plans for entrance to Grand Boulevard.**

The Laws of 1896, chapter 57, as amended by Laws of 1897, chapter 679, authorizing the commissioner of street improvements of the twenty-third and twenty-fourth wards of the city of New York to cause maps and profiles to be made showing the location, etc., of an approach to the Grand Boulevard and Concourse in said city, together with the subsequent charter of said city (Laws of 1897, chap. 378, §§ 455, 456, 457, 526), which transferred the powers and duties of said commissioner of street improvements in said wards to the commissioner of highways of said city and authorized such commissioner of highways to appoint a consulting engineer at a salary within the limits of an appropriation duly made therefor, do not empower said commissioner of highways to construct such approach or to enter into or bind the city by a contract with an engineer to make plans for said approach at his own expense, the compensation to be measured by a percentage on the estimated cost thereof.

A plaintiff who has made plans under such unauthorized contract cannot recover the agreed percentage from the city.

Such improvements must first be authorized and approved by resolution of the board of public improvements under section 413 of the charter.

Section 455 of the charter, which permits the commissioner of public highways, when authorized by the board of public improvements, to appoint a consulting engineer, does not authorize the making of a contract with an engineer to make plans at his own expense on commission.

APPEAL by the plaintiff, Percy S. Hildreth, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 5th day of July, 1905, upon the verdict of a jury rendered by direction of the court after a trial at the New York Trial Term.

*L. Laflin Kellogg*, for the appellant.

*Theodore Connolly*, for the respondent.

INGRAHAM, J.:

By chapter 57 of the Laws of 1896 the commissioner of street improvements of the twenty-third and twenty-fourth wards of the city of New York was directed, within one month after the passage of the act, to lay out and establish an approach and entrance to the Grand Boulevard and Concourse in the city of New York. The act then specified the real property upon which this approach was to be constructed, and provided: "And the said commissioner of street improvements shall cause to be made three similar maps or plans or profiles of the said approach and entrance to the Grand Boulevard and Concourse, so to be laid out as aforesaid, showing the location, width, course, windings and grades of such approach and entrance to the Grand Boulevard and Concourse, which maps, plans and profiles shall be certified to by the said commissioner of street improvements," and filed as in the act provided. The act then provided for the condemnation of the property to be taken for such improvements.

Nothing seems to have been done under that act during the year 1896, and by chapter 679 of the Laws of 1897, section 1 of the act was amended. The section, as amended, after describing the property to be taken, provided: "And the said commissioner of street improvements shall cause to be made three similar maps or plans or

App. Div.]

First Department, February, 1906.

profiles of the said approach and entrance to the Grand Boulevard and Concourse, so to be laid out as aforesaid, showing the location, width, course, windings and grades of such approach and entrance to the Grand Boulevard and Concourse, which maps, plans and profiles shall be certified to by the said commissioner of street improvements," and filed as therein provided.

After this act was passed and before the commissioner acted under it, the new charter of the city of New York (Laws of 1897, chap. 378) went into effect. By section 526 of the charter the office of commissioner of street improvements of the twenty-third and twenty-fourth wards was abolished and all his powers, privileges and duties were devolved upon the commissioner of highways of the city of New York, and were to be exercised and performed by him according to the provisions of the act. Section 455 of the charter provides that "the commissioner of water supply, the commissioner of highways, and the commissioner of sewers, shall each appoint, without definite term, when thereto authorized by the board of public improvements, a consulting engineer to their respective departments, who shall be an expert in all matters relating to the work performed by the department in which he is appointed and who shall have had at least fifteen years experience as a civil engineer." By section 456 the commissioner at the head of each of these departments was given power to appoint clerks and subordinates and to fix and regulate their salaries within the limits of the appropriation duly made therefor; and by section 457 the commissioner at the head of each of the said departments was required to prepare and execute all contracts authorized by the board of public improvements, or by said board and the municipal assembly for his department, and to "make and cause to be made all surveys, maps, plans, estimates and drawings of all works relating to his department."

Nothing seems to have been done in relation to this work until the 7th of November, 1901. On that day the board of public improvements passed a resolution "that in pursuance of section 455 of the Greater New York Charter, authority be and is hereby granted to the Commissioner of Highways to appoint a Consulting Engineer on the work of constructing an approach to the Central Bridge (One Hundred and Fifty-fifth street) to the junction with the

Grand Boulevard and Concourse at East One Hundred and Sixty-first Street, in the Borough of the Bronx." On the 12th day of November, 1901, the commissioner wrote a letter to the plaintiff as follows:

"DEAR SIR.— In accordance with resolution as passed by the Board of Public Improvements at the meeting of said Board, held on Wednesday, November 6th,\* and pursuant to Section 455 of the Greater New York Charter, and the provisions of Sections 1 and 2 of Chapter 57 of the Laws of 1896, as amended by Chapter 679 of the Laws of 1897, you are hereby appointed Consulting Engineer in the matter of the laying out, establishing and constructing an approach and entrance to the Grand Boulevard and Concourse from the Central Bridge (155th Street) to the junction of said approach with the Grand Boulevard and Concourse at or near 161st Street, Borough of the Bronx.

"As Consulting Engineer you will furnish your own services and make, at your own expense, all the necessary plans, both in general and detail, for retaining walls, slopes, embankments, substructures, masonry, steel work and all other work of whatsoever nature necessary in the construction of approach, from Central Bridge to the Grand Boulevard and Concourse, as stated above, together with the drawing up for approval of all necessary specifications, contracts, etc

"You will report to Mr. Josiah A. Briggs, Chief Engineer, Department of Highways, Borough of the Bronx, from whom you will receive the necessary instructions for your guidance.

"For the furnishing of above services you will be paid five (5) per centum of the cost of the work, payable as follows:

"Two (2) per cent. on the estimated cost of the work, payable when specifications and preliminary general plans and details have been drawn up and approved by the Commissioner of Highways.

"Three (3) per cent. on the actual cost of the work payable from time to time during the progress of same and in accordance with amounts returned on payments as due contractor.

"Respectfully,

"JAMES P. KEATING,

*"Commissioner of Highways."*

---

\* See.

App. Div.]

First Department, February, 1906.

Upon the receipt of this communication the plaintiff at once reported to the chief engineer in the department, and by the end of December he had prepared the plans for the construction of the approach, which were submitted to the commissioner of highways and approved by him on the 26th day of December, 1901. He claims to recover the compensation of two per cent upon the estimated cost of this work, such cost being estimated in three aspects: *First*, as a safe maximum cost, \$662,500; *second*, as a reasonable cost likely to be met, based on quantities in estimate, \$490,800; *third*, as a possible minimum cost, \$420,000. So far as appears, this was the last that had been heard of this construction; the plans were never used by the city, and the city obtained no possible benefit from the belated activity of the commissioner and the celerity with which the plaintiff made the plans and specifications and drawings necessary for this important work.

At the end of the case the court directed a verdict for the defendant. The plaintiff seeks to establish his right to recover, and claims that under the act of 1896, as amended by the act of 1897, there was an implied authority given to the commissioner of highways to construct this approach and to make such contracts as were necessary to carry out the intention of the Legislature, and that to enable him to construct such an approach the assistance of an architect or engineer was necessary. I do not think that this position can be sustained. The duty imposed upon the commissioner of street improvements for the twenty-third and twenty-fourth wards of the city of New York was to lay out and establish an approach and entrance to the Grand Boulevard and Concourse in the city of New York, and he was directed to cause to be made three similar maps or plans or profiles of such approach and entrance showing the location, width, course, windings and grades thereof. There was nothing in this act which expressly authorized the commissioner to construct a masonry and iron viaduct or structure at the expense of the city of New York of between \$400,000 and \$700,000. Nor did the direction contained in the act require him to employ an architect to make plans for the structure. When the power or duty imposed upon this commissioner of street improvements was transferred to the commissioner of highways of the city of New York, he was then required to perform the duties imposed upon him in accordance with the char-

ter of the city, and certainly under the charter the commissioner of highways was not authorized to construct this approach or to procure plans and specifications and contracts for its construction.

Section 413 of the charter provides that "Any public work or improvement within the cognizance and control of any one or more of the departments of the commissioners who constitute the board of public improvements, that may be the subject of a contract, must first be duly authorized and approved by a resolution of the board of public improvements and an ordinance or resolution of the municipal assembly. But no public work or improvement, involving an assessment for benefit, shall be so authorized until there has been presented to the board of public improvements an estimate in writing, in such detail as the board may direct, of the cost of the proposed work or improvement, and a statement of the assessed value, according to the last preceding tax-roll, of the real estate included within the probable area of assessment."

It is not alleged that this section was complied with. Before any contract could be made in relation to this improvement, the improvement must first be duly authorized and approved by a resolution of the board of public improvements and an ordinance or resolution of the municipal assembly, and this improvement, as such, was never authorized. The resolution of the board of public improvements which, in pursuance of section 455 of the charter, gave authority to the commissioner of highways to appoint a consulting engineer of the work of constructing an approach to the central bridge, was not an authorization and approval of the public work or improvement required by section 413 of the charter, and there is no evidence that the municipal assembly acted upon the question at all. This resolution, however, was simply to authorize the commissioner to appoint a consulting engineer who would be a subordinate in his department. It gave no right to make a special contract with him for his compensation, except so far as the commissioner was authorized to fix his salary which must be within the appropriation for his department, as to which there is no evidence. It seems to me that the act of 1896, as amended by the act of 1897, contained no authority for the commissioner to take any action in relation to the construction of the approach, and that the duties strictly imposed upon him by the act simply had relation to laying out the approach and mak-

App. Div.]

First Department, February, 1906.

ing the necessary plans so that proceedings might be taken by the city to acquire the property necessary therefor.

The plaintiff also insists that this contract was authorized by section 455 of the charter, which permits the commissioner of highways, when authorized by the board of public improvements, to appoint a consulting engineer to the department, but this alleged contract under which the plaintiff claims does not make the plaintiff a consulting engineer of the department. The plaintiff was appointed consulting engineer in the matter of laying out, establishing and constructing an approach and entrance to the Grand Boulevard and Concourse and as such he was required to furnish his own services and to make at his own expense "all the necessary plans, both in general and detail, for retaining walls, slopes, embankments, substructures, masonry, steel work and all other work of whatsoever nature necessary in the construction of approach, from Central Bridge to the Grand Boulevard and Concourse, as stated above, together with the drawing up for approval of all necessary specifications, contracts, etc." And for the furnishing of such services he was to be paid five per cent of the cost of the work. The appointment of a consulting engineer was entirely distinct from this employment to furnish, at his own expense, these plans and specifications and contracts for an improvement which had not been authorized as required by section 413 of the charter, and for which no plans were necessary, as, so far as appears, even the title to the property had not been acquired. Assuming that the commissioner had power to appoint the plaintiff as consulting engineer in his department, there was no power to make a contract with him as such consulting engineer to furnish plans and specifications and contracts for the construction of a work not authorized. Such a contract was not fixing the salary of a consulting engineer within the provisions of section 456 of the charter. No plans, specifications and contracts for the construction of the approach were required until the improvement was authorized by the proper municipal authorities. The preparation of the plans, specifications and contract was a part of the work of constructing the approach, and authority to appoint a consulting engineer gave the commissioner no authority to make a contract for the preparation of plans, specifications and contract for an improvement not legally authorized by the proper municipal authorities.

An entirely different question would be presented if, after these plans and specifications had been furnished under such a contract, proper proceedings had been taken by which this structure had been authorized and the plans, specifications and contract made by the plaintiff had been accepted and used by the city, and the approach constructed under it; but in the absence of any such evidence there was no legal obligation on the part of the city to pay for the services rendered by the plaintiff.

I think, therefore, that the judgment appealed from should be affirmed, with costs.

O'BRIEN, P. J., McLAUGHLIN, LAUGHLIN and CLARKE, JJ., concurred.

Judgment affirmed, with costs.

---

ELNA BLAKLY HALL, as Executrix, etc., of JOSEPHINE B. CLOPTON,  
Deceased, Respondent, v. OTTO WAGNER and Others, Appellants.

First Department, February 9, 1906.

**Conversion of stock — when transferee of messenger sent for stock liable for conversion — when messenger not clothed with indicia of title — evidence — conversations of messenger with deceased owner of stock excluded — when testimony on rebuttal founded on matter brought out on direct examination.**

The plaintiff's testatrix had pledged stock with brokers to secure a loan, and to enable them to collect the dividends had transferred the stock to the name of said brokers. The testatrix telephoned the brokers that she would redeem the stock, and sent a messenger with a check for the amount of the loan. The brokers delivered the stock to the messenger with power of attorney executed thereon, so that the stock could be transferred by the bearer. The messenger converted said stock to his own use by delivering the same to other brokers to be credited to his account, and afterwards directed it to be sold, which was done and the proceeds paid to said messenger. In an action for conversion against the brokers to whom the messenger had delivered the stock,

*Held*, that as the owner had conferred no indicia of title on the messenger or apparent authority to transfer title, there was no estoppel, and her executrix could recover the value of said stock from the brokers;

That, although the brokers with whom the stock was originally pledged had authority to deliver to the messenger, they had no authority to deliver it



App. Div.]

First Department, February, 1906.

in such form that the messenger was invested with an apparent power of disposal;

That the conversations of such messenger with the testatrix were inadmissible under section 829 of the Code of Civil Procedure, as such messenger was an interested party within the meaning of said section, for the defendant brokers were seeking to show that the title of such messenger was good, and further, because he was personally interested, being liable to the defendants if they were liable to the plaintiff;

That, as the messenger testifying for the defendants on direct examination had stated that he had notified the plaintiff's husband that he had kept the stock in his possession, and had stated on cross-examination that he had shown the plaintiff's husband the paper on which defendants' title was based, it was not error to allow the plaintiff's husband to contradict the latter's statement on rebuttal, as the foundation for the cross-examination was testimony brought out on direct examination.

LAUGHLIN and HOUGHTON, JJ., dissented, with memoranda.

APPEAL by the defendants, Otto Wagner and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 30th day of March, 1905, upon the verdict of a jury, and also from an order entered in said clerk's office on the 19th day of April, 1905, denying the defendants' motion for a new trial made upon the minutes.

*William M. Seabury*, for the appellants

*James L. Bishop*, for the respondent.

INGRAHAM, J. :

The plaintiff sues to recover the value of 100 shares of the first preferred stock of the Erie Railroad Company, alleged to have been the property of the plaintiff's testatrix. The evidence is undisputed that the plaintiff purchased and paid for this stock; that the stock was delivered to her and at her request was transferred in the name of Webb & Prall, stockbrokers, to enable them to collect the dividends; that on July 27, 1903, she borrowed the sum of \$2,000 from Webb & Prall, depositing this 100 shares of stock with them as collateral security for the loan; that on April 12, 1904, she called up the main office of Webb & Prall on the telephone and stated that they had a loan in her name; that she wanted to pay it off, and inquired as to the amount of interest, which was stated to be \$68.90, to which she said, "All right, I am going to send down

for it soon." On the same day the plaintiff's testatrix's check for the amount of the loan and interest was delivered to Webb & Prall, and they delivered to the messenger who delivered the check the certificate of stock, with a power of attorney to transfer it signed by Webb & Prall, so that the stock could be transferred to the person presenting the certificate. There was no written order to deliver the stock to the messenger who delivered the check paying the loan, and the only authority to deliver it was contained in this telephone message by which the plaintiff's testatrix is said to have informed the representative of Webb & Prall that she intended to send for the stock. The messenger who took this check and received the stock was one Weyant. It appeared that he had transacted business for the plaintiff's testatrix, and had been engaged in stock speculations with her, in which apparently they had been jointly interested. On the day after this transaction the plaintiff's testatrix died. Weyant testified that he received this certificate from Webb & Prall when he delivered the check paying off the loan; that he retained it until August 14, 1904, after the death of the plaintiff's testatrix; that he then took it to a firm of stockbrokers named Wagner, Schalk & Co., the defendants in this action, and delivered it to them to be credited to his account, and subsequently directed the stock to be sold. Immediately after the defendants received this stock they had it transferred in their own name, and subsequently, upon the order of Weyant, sold the stock and accounted to him for the proceeds.

The court submitted to the jury the question as to whether Weyant was the owner of the stock or had an interest in it, and charged them that if they find that Weyant had an interest in the stock they should find a verdict for the defendants, and also instructed them: "If you conclude that Weyant did not own the stock, and that he has no such interest in the stock as has been claimed by the defendants, and that he was simply the messenger sent by Mrs. Clopton to the banking firm of Webb & Prall to deliver the check and to receive the custody of this certificate for the purpose of delivery back to Mrs. Clopton, that he had no interest or authority beyond that, then he committed a criminal act when he negotiated this certificate of stock with the defendants in this case, an act which cannot be permitted to prejudice the rights of the estate of

App. Div.]

First Department, February, 1906.

Mrs. Clopton. If you find those facts to be as I have last described them, the plaintiff is entitled to a verdict." To this defendants excepted, and requested the court to charge that the rights of the defendants in this case did not depend upon the actual title or authority of the party with whom they dealt directly, but were derived from the act of the real owner, which precluded her from disputing as against them the existence of the title or power which through negligence or mistaken confidence she caused or allowed to appear to be invested in the party with whom they dealt. This request the court refused and the defendants excepted. There was evidence introduced by the defendants which it is claimed was sufficient to show that Weyant had an interest in the stock, but the evidence was certainly not conclusive and the jury having passed upon that question of fact, we must assume that Weyant had no title to the stock.

The substantial question is whether, on the evidence presented, the jury would have been justified in finding that the plaintiff's testatrix had conferred upon Weyant an apparent title to the stock which would have estopped her or her representatives from disputing his title. This position of the defendants is based upon a principle established by a line of authorities of which *McNeil v. Tenth National Bank* (46 N. Y. 325) is a leading case. This principle is thus stated: "It must be conceded, that as a general rule, applicable to property other than negotiable securities, the vendor or pledgor can convey no greater right or title than he has. But this is a truism, predicable of a simple transfer from one party to another where no other element intervenes. It does not interfere with the well established principle, that where the true owner holds out another, or allows him to appear, as the owner of, or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence he caused or allowed to appear to be vested in the party making the conveyance \* \* \*. The true point of inquiry in this case is,

whether the plaintiff did confer upon his brokers such an apparent title to, or power of disposition over the shares in question, as will thus estop him from asserting his own title, as against parties who took *bona fide* through the brokers. Simply intrusting the possession of a chattel to another as depositary, pledgee or other bailee, or even under a conditional executory contract of sale, is clearly insufficient to preclude the real owner from reclaiming his property, in case of an unauthorized disposition of it by the person so intrusted. \* \* \* 'The mere possession of chattels, by whatever means acquired, if there be no other evidence of property or authority to sell from the true owner, will not enable the possessor to give a good title.' \* \* \* But if the owner intrusts to another, not merely the possession of the property, but also written evidence over his own signature, of title thereto, and of an unconditional power of disposition over it, the case is vastly different. There can be no occasion for the delivery of such documents, unless it is intended that they shall be used, either at the pleasure of the depositary, or under contingencies to arise. \* \* \* In the present case, the plaintiff delivered to and left with his brokers, the certificate of the shares, having indorsed thereon the form of an assignment, expressed to be made 'for value received,' and an irrevocable power to make all necessary transfers. The name of the transferee and attorney, and the date, were left blank. This document was signed by the plaintiff, and its effect must be now considered."

It was under that state of facts that the court held that the plaintiff was estopped from denying the right of the plaintiff's broker to transfer the stock. The principle announced in this case has been much discussed, and in *Know v. Eden Musee Co.* (148 N. Y. 441) it was somewhat limited. The court there said: "The case of *McNeil v. Tenth National Bank* is a leading case on the subject, and marks the limit to which the court has hitherto gone in subordinating the rights of the true owner of a stock certificate to the title of a transferee derived under one who, being in possession of the certificate by the consent of the true owner, has transferred it in fraud of his rights. That case holds that an agent to whom the owner has delivered a certificate of stock duly indorsed for transfer, with a limited power of disposition for a special purpose, may bind the title thereto as against the true owner by transferring it to a

App. Div.]

First Department, February, 1906.

*bona fide* transferee who has no notice of the limitations of the agent's authority, although the transfer was made for an unauthorized purpose and with the intention on the part of the agent to commit a fraud upon his principal. \* \* \* The courts have been frequently importuned to extend the qualities of negotiability of stock certificates beyond the limits mentioned and clothe them with the same character of complete negotiability as attaches to commercial paper, so as to make a transfer to a purchaser in good faith, for value, equivalent to actual title, although there was no agency in the transferrer and the certificate had been lost without the fault of the true owner or had been obtained by theft or robbery. But the courts have refused to accede to this view, and we have found no case entitled to be regarded as authority which denies to the owner of a stock certificate which has been lost without his negligence, or stolen, the right to reclaim it from the hands of any person in whose possession it subsequently comes, although the holder may have taken it in good faith and for value. The precise question has not often been presented to the courts, for the reason probably that they have with great uniformity held that stock certificates were not negotiable instruments in the broad meaning of that phrase, but, whenever the question has arisen, it has been held that the title of the true owner of a lost or stolen certificate may be asserted against any one subsequently obtaining its possession, although the holder may be a *bona fide* purchaser."

To establish this estoppel it must appear that the true owner had conferred upon the person who has diverted the security the *indicia* of ownership, or an apparent title or authority to transfer the title. The reasoning in all the cases negatives the extension of the principle to a case where a stock certificate such as the one in question has been stolen or fraudulently obtained from the true owner; for there the owner of the stock had by no voluntary act conferred upon the third party the *indicia* of ownership, apparent title or right to transfer the stock, and so I assume that if the owner of a certificate of stock, with a valid transfer executed by the person in whose name the stock stood, should give it to a messenger to be carried to a bank for safekeeping and that messenger on the way should divert the stock and transfer it to a *bona fide* purchaser for value, such a transfer would not estop the owner from asserting title,

for the reason that the owner had never conferred upon such a messenger an apparent title or the *indicia* of ownership. The plaintiff's testatrix on the twelfth of April, when this certificate of stock was in the possession of Webb & Prall, her brokers, was the owner of the stock, as was found by the jury upon evidence sufficient to sustain the finding. Assuming that Webb & Prall were authorized to deliver the certificate of stock to the messenger who presented plaintiff's testatrix's certified check to pay the loan, there was no authority for Webb & Prall to deliver this stock to the messenger in such a condition that the messenger would be invested with the apparent ownership or authority to transfer it. By no act of the plaintiff's intestate did she confer upon Weyant the ownership of the stock or the right to transfer or dispose of it. It cannot be assumed that she intended that the stock should be transferred to Weyant, or that Webb & Prall should deliver it to Weyant with a power of attorney in blank which would authorize Weyant to transfer the stock. It was her stock. She sent for it, but neither authorized Webb & Prall nor any one else to transfer it to Weyant, or to the defendant, nor gave any apparent authority to either of them for that purpose. No act of the plaintiff's testatrix was sufficient to estop her or her estate from insisting upon her title to the stock in the hands of the defendants, or any one else; and unless it is intended to confer upon certificates of stock the attributes of negotiable instruments, which the courts of this State have uniformly refused to do, the claim that the defendants here acquired, as against the plaintiff's testatrix, or as against her estate, any title to this stock, cannot be sustained.

The only other points to be considered are those arising on the exceptions to rulings upon questions of evidence. Weyant was called for the defendants and testified that he had financial relations with the plaintiff's testatrix; that he knew that in November, 1901, 100 shares of the Erie preferred were purchased by Ennis & Stoppani for the benefit of the testatrix; that he was with the plaintiff's testatrix when she took this 100 shares of stock to Webb & Prall, about July 27, 1902; that the plaintiff's testatrix went to the office of Webb & Prall with the certificate and had it transferred in the name of Webb & Prall, so that they could receive the dividends on behalf of the plaintiff's testatrix; that on the afternoon of April 12, 1904, he went to the office of Webb & Prall with

App. Div.]

First Department, February, 1906.

a check for \$2,000 and the interest, and took up a certificate of 100 shares of Erie first preferred; that this certificate stood in the name of Webb & Prall, who had signed a blank power of attorney on its back, without any name being filled in as transferee, and he took the certificate back to the house of the plaintiff's testatrix. He was then asked whether he delivered the certificate of stock to the plaintiff's testatrix. This was objected to, the objection sustained and the defendants excepted. He then testified that he retained this certificate exclusively in his possession until August 14, 1904, when he delivered it to the defendants, and that he then notified Mr. Hall, the husband of the plaintiff, to that effect; that he had a conversation with Mrs. Hall (plaintiff) with reference to the certificate; that he subsequently directed the defendants to sell the stock, which they did, and turned the proceeds over to him. He then identified the signature of the plaintiff's testatrix to an instrument which was offered in evidence. The defendants claimed that it was error to sustain these objections to conversations between the witness and the plaintiff's testatrix, upon the ground that they were incompetent under section 829 of the Code of Civil Procedure. That section provides that "Upon the trial of an action, \* \* \* a party or person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title, by assignment or otherwise, shall not be examined as a witness, in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person. \* \* \* concerning a personal transaction or communication between the witness and the deceased person." We think this evidence was properly excluded upon the ground that the witness derived his interest or title from the deceased within the provisions of this section. Weyant transferred this stock to the defendants, who accepted it and sold it upon his order and accounted to him for the proceeds. Their defense is that Weyant was the owner of the stock and entitled to dispose of it, and that their title as transferee of Weyant was a good title. It would be a direct violation of this provision of the statute to allow their title to be sustained by the testimony of Weyant as to personal transactions with the testatrix to show that Weyant had a title to the stock. The declarations of the plaintiff's

testatrix as to the ownership of the stock are only relevant to prove the claim of the defendants that Weyant had acquired title to the stock from the plaintiff's testatrix, and that he had the right to transfer it to the defendants. To allow this testimony would, therefore, have been to allow the person through whom the defendants claimed the stock to testify to a personal transaction with the deceased which would divest her of title and vest it in the person from whom the defendants claimed to have acquired title. I think it was also incompetent because Weyant was a person interested in the successful maintenance of this defense. If the defendants are liable he would then be clearly liable to them for the proceeds of this stock that he had transferred to them. He was, therefore, directly interested in the result within *Redfield v. Redfield* (110 N. Y. 671).

The appellants also claim that it was error to allow the husband of the plaintiff to contradict the testimony of Weyant upon cross-examination that he showed the witness a copy of this instrument upon which the claim of the defendants to the ownership of this stock was based some time after the death of the testatrix. Weyant, in his direct examination, had testified that he retained this certificate of stock exclusively in his possession until April 14, 1904, when he left it with the defendants; that he had notified Mr. Hall, husband of the executrix, to that effect; that he took Mr. Hall down to Ennis & Stoppani and introduced him to them; told them who he was, and told them about the Erie first preferred and about drawing the check for \$2,000. Subsequently, on motion of counsel for the plaintiff, this statement as to what the witness told Mr. Hall was stricken out. The witness also testified to a conversation with Mrs. Hall with reference to this certificate. Upon cross-examination he testified that he showed the paper upon which the defendants' claim to the stock was based to Mr. Hall, but never showed it to Mrs. Hall; that he told her about it, and she said it was all right, she did not want to see it; that he showed it to Mr. Hall a few days after Mrs. Clopton's death, when he went down to Ennis & Stoppani's office, and at that time produced this identical paper just as it was then, and showed it to Mr. Hall on the Rector street elevated station; that he showed it to him for the purpose of explaining the Erie first preferred.



App. Div.]

First Department, February, 1906.

In rebuttal the plaintiff called Hall, who testified that he was the husband of the plaintiff, and was asked whether he had ever seen this paper which Weyant said he had shown to him. That was objected to as incompetent, immaterial and irrelevant and an attempt to contradict a witness put upon the stand by the defendants and examined as to a collateral issue by the plaintiff. This objection was overruled and the defendants excepted. I do not think this was error. Weyant, on his direct examination, had testified that he had had conversations with both Mr. and Mrs. Hall in relation to this stock. The cross-examination of Weyant by the plaintiff was in relation to these conversations about which he had testified in chief. The examination of Weyant as to what took place at these interviews, about which he had testified, was strictly a cross-examination, and not testimony called forth by the plaintiff whereby she made the witness her own. As to just how far counsel should be allowed to go upon rebuttal is largely in the discretion of the court, and while the rule is well settled that where a party upon cross-examination inquires into strictly collateral matter that has no relation to the examination in chief, it is not competent for him to call a witness to contradict or disprove the testimony thus given, nevertheless, where the examination has relation to the subject upon which the witness has testified upon direct examination, it is not a collateral matter which cannot be contradicted. Weyant, in his testimony, endeavored to create the impression that the plaintiff and her husband, who was acting for her in settling the estate, had acquiesced in his claim to the ownership of this stock, and I think it was a legitimate cross-examination to inquire of the witness just what statements he had made to the plaintiff or to her husband upon which he asked the jury to base that conclusion. I do not think, therefore, that it was error to allow the witness Hall to deny the statement made by Weyant as to his conversations or interviews with Hall.

There are other exceptions to rulings upon testimony, but they do not require discussion.

I think that the judgment and order should be affirmed, with costs.

O'BRIEN, P. J., and McLAUGHLIN, J., concurred; LAUGHLIN and HOUGHTON, JJ., dissented.

LAUGHLIN, J. (dissenting):

I dissent on the ground that it was error to receive Hall's testimony in contradiction of Weyant's.

HOUGHTON, J. (dissenting):

I dissent on the ground that the objection was not sufficient to raise the question of Weyant's competency as a witness, the objection being to the competency of the evidence merely.

Judgment and order affirmed, with costs.

---

FERDINAND N. MONJO and JENNIE M. MONJO, His Wife, Respondents,  
v. ADDIE WOODHOUSE, Appellant, Impleaded with GEORGE A.  
WIDMAYER and Others, Defendants.

First Department, February 9, 1906.

**Will—discretionary power of disposal by widow—when widow may exercise such power by a devise charged with advancements to other heirs.**

When a will gives to the testator's widow a life estate in certain real property with power "to devise the same by her last will and testament \* \* \* to any or all of our children or grandchildren or both in such shares or proportions as to her shall seem best," and in the event of a failure to exercise such power of disposal by the widow the will gives said property in remainder "to my children," etc., the widow has power to devise a portion of said real estate to a granddaughter of the testator charged with deductions equal to the amounts the testatrix has advanced to the father and brother of said granddaughter then living.

As the testatrix, under her husband's will, had power to cut off such granddaughter entirely, she cannot complain because the devise is charged with said deductions.

Nor can she contend that there was a failure by the widow properly to exercise the power of disposal, for in that event the share of the lands would go to the father of said granddaughter then living.

McLAUGHLIN and HOUGHTON, JJ., dissented, with opinion.

APPEAL by the defendant, Addie Woodhouse, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 31st day of March,

App. Div.]

First Department, February, 1906.

1905, upon the decision of the court rendered after a trial at the New York Special Term.

*Robert H. Honeyman*, for the appellant.

*Eugene L. Bushe*, for the respondents.

INGRAHAM, J. :

This action was to partition real property, and the only question presented is as to the right of the defendant, appellant, to an interest therein. This depends upon the construction to be given to the 3d clause of the will of George Widmayer, and an attempted exercise of a power of appointment given by that clause by his wife in her last will and testament. At the time of his death George Widmayer was the owner of the premises in question. The 3d clause of his will provides as follows: "I hereby give and devise to my said wife Johanna B. Widmayer my house and lot number 115 West 61st street in the City of New York, to have and to hold the same to her for and during the term of her natural life, with full power and authority to my said wife to devise the same by her last will and testament, or by an instrument in writing in the nature thereof to any or all of our children or grandchildren or both in such shares or proportions as to her shall seem best. And in the event of my said wife not disposing of said house and lot by her last will and testament or by an instrument in writing in the nature thereof to or among our children or grandchildren or some of them, as she is hereinabove authorized, then upon her death without having disposed thereof as aforesaid, I give and devise the said house and lot number 115 West 61st street in the City of New York to my children equally and to my grandchildren, the children of my deceased daughters Margaret E. Ebbinghausen and Mary Emma Monjo *per stirpes* as tenants in common to them, their heirs and assigns forever." If the widow failed to exercise the power of appointment, the appellant, Addie Woodhouse, would have been entitled to no share of the property, as her father, who was one of the children of the testator, was still alive. The testator's wife attempted to exercise this power by the 2d and 3d clauses of her will. The 2d clause, after reciting the provisions of the will of

APP. DIV.—VOL. CXI. 6

her husband, provided as follows: "Now I do hereby exercise the power and authority given to me in and by my husband's said will to dispose of said house and lot, and I do give and devise the said house and lot No. 115 West 61st street, in the City of New York, where I now reside, being the same house and lot which is now known by the street number 137 West 61st street, to and among our children and grandchildren, that is to say: One-fifth part thereof to our son George A. Widmayer, one-fifth part thereof to our son William F. Widmayer, one-fifth part thereof to our granddaughter Addie Woodhouse, wife of V. H. Woodhouse of New York City, daughter of our son Henry E. Widmayer; one-fifth part thereof to our grandson Ferdinand N. Monjo, son of our deceased daughter Mary Emma Monjo; one-tenth part thereof to our granddaughter Julia M. Hurtt, daughter of our deceased daughter Margaret Ebbinghausen; and one-tenth part thereof to our grandson George Henry Ebbinghausen, son of our deceased daughter Margaret Ebbinghausen, as tenants in common, to them and their heirs and assigns forever." By the 3d clause of this will, however, the devise to her granddaughter, Addie Woodhouse, is made upon the express condition that "said  $1/5$  part shall be charged with the payment of the indebtedness of my said son Harry E. Widmayer to me, and of my grandson Harry Widmayer to me, and whereas my said son Henry E. Widmayer and Harry Widmayer each is now indebted to me in a large amount, together with the interest thereon, for moneys loaned by me to each of them respectively, I do hereby charge the payment of the said indebtedness and the interest thereon and also all other sums in which either of them may be indebted to me at the time of my decease, and the interest thereon, upon the said  $1/5$  part of the said house and lot hereinabove given and devised to my said granddaughter Addie Woodhouse, and direct that out of the said  $1/5$  part of the said house and lot the said indebtedness shall be paid to my executor as part of my residuary estate, and if said  $1/5$  part or the  $1/5$  part of the proceeds of the said house and lot when sold shall not be sufficient to pay all the said indebtedness, with interest, then any balance of the said indebtedness which shall remain unpaid after applying said proceeds in part payment shall be charged against and paid out of the one-fifth part of my residuary estate hereinafter given,

App. Div.]

First Department, February, 1906.

devised and bequeathed to my said granddaughter, Addie Woodhouse. My intention in respect to the said devise hereinabove made of such undivided one-fifth part of my said house and lot to my said granddaughter Addie Woodhouse, and in respect to the devise and bequest hereinafter made to my said granddaughter, Addie Woodhouse, is that the said indebtedness of her father and brother to me shall be paid to my estate to form a part of my residuary estate, and that the same shall be deducted from the said one-fifth part of the said house and lot, and if necessary any balance thereof which shall remain unpaid shall be deducted from the one-fifth part of my residuary estate hereinafter given, devised and bequeathed to my said granddaughter Addie Woodhouse." By the 5th clause of the will the residuary estate of the testator, both real and personal, is divided between her children and grandchildren, one-fifth part thereof to the testator's granddaughter Addie Woodhouse. The appellant, Addie Woodhouse, attacks this condition annexed to the exercise of the power of appointment in her favor upon the ground that it was unauthorized by the original will and that, therefore, she took the devise of one undivided fifth discharged of that condition. The power of appointment contained in the original will gave to the testator's wife an absolute power of appointment by which she could have given this house to any one or more of her children or grandchildren, or divided it among them in such portions as she saw fit. She was not bound to give to this appellant, Addie Woodhouse, any interest in the house. In considering the validity of the exercise of this power of appointment the whole will by which it was attempted to be executed must be read together, and if the result is that the real property was actually divided among the husband's children and grandchildren, Addie Woodhouse has no cause to complain. It is entirely clear that the grantee of the power did not intend to give to Addie Woodhouse an undivided fifth of this property free of any charge upon it in favor of her other children. What she intended was to charge the bequest of one-fifth to the appellant with the payment of a sum of money to her children and other grandchildren to whom she devised the residuary estate. I suppose there would be no question as to the validity of the exercise of this power if she had given an interest in that property to Addie Woodhouse subject to the payment of a specific sum by

Addie Woodhouse to other of her children and grandchildren, fixing the amount that she was to pay them as a condition for receiving the interest in the property, and yet this is what the provisions of the will taken as a whole accomplish. The amount of the charge was not determined in the will, but was to be determined after her death by the amount that her father or her brother owed to the testatrix. When this will is fully executed, all the real property of which the testatrix was given power of disposition will be divided among the original testator's children and grandchildren. No part of it was devoted to any other purpose; no part of it could be devoted to the payment of the testator's debts or to the expense of administering the estate. The testatrix adopted a method of dividing this property among her children and grandchildren, by which she gave to Addie Woodhouse the share that her father would have received if the power of appointment had not been exercised, but upon condition that Addie Woodhouse should pay out of that share the amount of the indebtedness of her father and brother to the testatrix, to her other children and grandchildren; but whether or not Addie Woodhouse would, under this scheme, be entitled to any interest in this real property, was quite immaterial, as the testatrix had power to provide that she should have no interest; and if the testatrix gave her an interest, however small, it was giving her something to which she was not legally entitled without the exercise of the power by the testatrix in her favor. I do not see, therefore, that she can complain because the testatrix imposed as a condition of her receiving an interest in this property that it should be subject to the payment of a sum to be ascertained after the testatrix's death in favor of the other children or grandchildren of the testatrix. If, however, it should be held that this was not a valid exercise of the power granted to the testatrix by the will of her husband, the appellant would not then be entitled to any interest in the property, for it would pass under the will of the testator to the appellant's father. If the power was exercised, the interest that the appellant could take under the exercise of the power must be subject to the conditions imposed by the testatrix. If those conditions were illegal or improper, then there was no exercise of the power and the property passed under the will granting the power. In the con-

App. Div.]

First Department, February, 1906.

struction of wills the primary duty of the court is to ascertain the intention of the testator and for that purpose the whole instrument must be read together. Nothing can be clearer than that in the exercise of this power it was not the intention of the testatrix exercising it to give to this appellant an undivided one-fifth of this real property. To so construe the will would be in direct violation of the intention of the testatrix. The testatrix, in the execution of the power, gave to the appellant one-fifth interest in the property charged with the payment of certain sums which under the will would go to the children and other grandchildren of the testatrix. That was either a valid exercise of the power or it was not. If valid, the appellant took the share charged with the payment of the amount due to the testatrix from her father and brother. If invalid, the result was that the real property passed under the original will, and in it the appellant would have no interest. So that, whether we treat this as a valid or invalid exercise of the power, the appellant was not aggrieved by the judgment appealed from.

It follows that the judgment appealed from must be affirmed, with costs to the respondents against the appellant.

O'BRIEN, P. J., and LAUGHLIN, J., concurred; McLAUGHLIN and HOUGHTON, JJ., dissented.

HOUGHTON, J. (dissenting):

I do not think the widow had any power to charge the one-fifth part of the real property which she apportioned to the appellant with the payment of the debts owing to her by appellant's father and brother, for the purpose of swelling the residue of her own estate. Nor do I think the legal principle is at all changed by the fact that the residue of the widow's estate is bequeathed to the same persons and in the same proportions in which she devised the real estate under the power given to her by the will of her husband; or by the fact that the widow had the right under that power to withhold from appellant any part of the real property concerning which power of disposal was given to her, or to give appellant a large or small amount as she saw fit. The power of appointment as to real property must be strictly followed, and its execution is governed by the principles of agency. (*Hillen v.*

*Iselin*, 144 N. Y. 374.) Where a power exists to apportion real property, the holder of the power cannot limit the estate for life with remainder to issue, unless so expressly authorized (*Stuyvesant v. Neil*, 67 How. Pr. 16); nor can a specific fund arising from the sale of real estate, directed to be apportioned, be charged with the expense of settling the estate of the person exercising the power. (*Cochran v. Elwell*, 46 N. J. Eq. 333.)

The will of George Widmayer expressly devised the property in case the widow should not exercise the power conferred upon her. The title was, therefore, in his several devisees in the proportions named by him, subject, however, to be divested as to any one by the exercise of the power by the widow in a different manner in favor of any of those in the class specified. Appellant was not one of those named by the original testator, but she was one of the class included within the power.

It does not appear what the value of the one-fifth part of the real property apportioned to appellant is, nor is the amount of indebtedness of appellant's father and brother charged thereon shown. Whether the indebtedness be much or little, when it shall be paid to the residuary estate of the widow it is exposed to the hazard of debts against her estate, and to the burden of executors' commissions and expenses of administration, and possibly to inheritance transfer tax. It may be wholly eaten up by debts and, to some extent at least, will be diminished by executors' fees and expenses of administration. Such a state of affairs the widow was given no power to create.

It is no answer to say that the widow may have apportioned only one-twentieth or any other part to the appellant instead of one-fifth if she had so wished, and hence that if appellant shall pay the indebtedness specified she may still have left some aliquot part of the real property which the widow could have fixed as her portion, if she had seen fit so to do. The widow did fix appellant's portion at one-fifth, and I think she had no power to charge it with the payment of any debts owing to her, and that that condition must fail.

The condition being illegal, and the apportioning to appellant of one-fifth part being entirely within the power, the apportionment should stand and the condition be declared to be ineffectual. I



App. Div.]

First Department, February, 1906.

think, therefore, that the judgment should be modified so that it shall declare that the appellant takes a one-fifth interest in the real property free from any charge.

McLAUGHLIN, J., concurred.

Judgment affirmed, with costs to respondents against appellant.

---

**MARTHA STRONGE, Appellant, v. THE SUPREME LODGE, KNIGHTS OF  
PYTHIAS, Respondent.**

First Department, February 9, 1906.

**Membership life insurance association—change of beneficiary under  
by-laws—failure of insured to give indemnity on changing beneficiary  
—indemnity waived by insurer.**

When the certificate of membership and the rules and regulations of a membership life insurance association provide that a member may change his beneficiary "as often as desired, consent of the existing beneficiaries not being required," etc., a beneficiary first named, and who refuses to surrender the policy intrusted to her, acquires no vested rights which prevent a change of beneficiary by the member on his complying with the provisions of the association in that respect.

Although the rules of such insurer require the insured to furnish indemnity in case he is unable to surrender the policy when changing a beneficiary, such provision is for the security of the association only and the failure of the member to furnish such indemnity when required cannot be taken advantage of by a former beneficiary when the insured has in other respects complied with the rule.

The insurer may waive provisions designed only for its own protection.

HUGHTON, J., dissented, with memorandum.

APPEAL by the plaintiff, Martha Stronge, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 7th day of July, 1905, upon the decision of the court, rendered after a trial before the court without a jury at the New York Trial Term, dismissing the complaint upon the merits.

*S. Livingston Samuels*, for the appellant.

*James C. de La Mare*, for the respondent.

INGRAHAM, J.:

There is no substantial dispute as to the facts in this case. The defendant, under its constitution, issued to one John M. Irvine a

certificate of membership which recited that the said John M. Irvine was a member of section 85 of the Endowment Rank, Knights of Pythias, and that in consideration of the payment by the said member of the prescribed membership fee and of all monthly payments, assessments and dues as required, and that he shall be in good standing under the said laws, rules and regulations, the defendant would pay to "Martha Stronge, his sister-in-law, the sum of Three thousand dollars out of the Endowment Fund of the Rank, in accordance with and under the laws governing the payment of benefits, upon due notice and satisfactory proof of death and good standing in the Rank at time of death and a full receipt and surrender of this certificate, subject, however, to the conditions and agreements subscribed to by said member in his application, and to the further conditions and agreements hereinafter named and provided; also that this certificate shall not have been surrendered by said member or canceled at his request and another certificate issued in accordance with the laws of the Rank. \* \* \* Provided further, that the beneficiary herein designated shall acquire no interest whatever in the certificate nor in the Endowment Fund until the benefit shall have lawfully accrued by reason of the death of said member and no subsequent change in the beneficiary shall have been made."

The rules and regulations of the defendant provide that each applicant for membership shall designate in his application "some person or persons related to or dependent upon him for support, as hereinafter provided, to whom the benefit shall be paid when due, and the name or names and the relationship of the person or persons so designated shall be inserted in the Endowment certificate." It was also provided that any member desiring to change his beneficiary or beneficiaries should make application on a form provided by the board of control. "The secretary of the section shall attest the same, and forward such application with the certificate originally issued, or then in force, and a fee of fifty cents, to said Board of Control, who shall, if the change be in accordance with law, as specified in section 380, issue a new certificate, containing the name or names of the substituted beneficiary or beneficiaries. Such change may be made at any time and as often as desired, consent of the existing beneficiaries not being required." It was also provided that "In case a member desiring to change his beneficiary shall be

App. Div.]

First Department, February, 1906.

unable to surrender the original certificate, or the certificate then in force, by reason of the act or refusal of the beneficiary named therein, or from any other cause, the Board of Control may issue a new certificate upon proof of the facts by affidavit of the member, and the execution by him of such instruments of release or indemnity as shall be deemed necessary."

The certificate in question was issued on the 5th day of May, 1903. On the 13th day of May, 1904, the said Irvine executed and delivered to the defendant an instrument in writing, and an affidavit annexed thereto, by which said Irvine changed the beneficiary named in said certificate and nominated and appointed his adopted daughter, Annie Elizabeth Fee, as beneficiary in said certificate in the place of the plaintiff, and revoked the appointment of the plaintiff as beneficiary in the said certificate.

The court found that at the time of the delivery of this instrument and affidavit, Irvine had complied in every respect with the general laws, rules and regulations of the defendant so far as the defendant required him to comply with the same, except as to the surrender of the said certificate of membership to defendant, and did all that he was able to do as he was required by said general laws, rules and regulations. This instrument, with the affidavit, having been forwarded to the defendant, on May nineteenth the defendant wrote to Irvine acknowledging the receipt of the instrument changing the beneficiary, with the affidavit, and the fifty cents required by the rules to be paid, saying: "The papers that you submitted appear to be satisfactory and in conformity with the rules and requirements of the Board of Control. Before, however, a new certificate can be issued under the circumstances, the full requirement exacted by the Board in all cases and as provided for in Section 80, p. 67 of the Endowment Rank Laws must be complied with." The letter then quoted the law, which provided that the member must execute a release or indemnity as should be necessary, calling his attention to this provision of the law and stating that if Irvine would file with the board a bond with one or more good sureties for the sum of \$3,000, to protect the defendant in case it issued the certificate as required, the papers would then be acted upon to Irvine's satisfaction. The day after this letter was written, and on May twentieth, Irvine died in Texas. Annie Elizabeth Fee,

substituted beneficiary, made due proof of the death of the said Irvine and claimed the amount due, and the court found as a conclusion of law that Irvine, by the instrument dated May 13, 1904, duly revoked the designation of the plaintiff as his beneficiary in the certificate referred to and duly changed the beneficiary named in said certificate and appointed the said Annie Elizabeth Fee as his beneficiary in place of the plaintiff; that the act of the plaintiff in refusing to surrender the said certificate for the purpose of changing the beneficiary was wrongful, and that she could not take advantage of her refusal to surrender the certificate, and that the defendant was entitled to judgment dismissing the complaint.

The plaintiff claimed and asked the court to find that Irvine, for a valuable consideration moving to him from the plaintiff, agreed with the plaintiff to make her his beneficiary and to have the defendant issue to her a certificate as such, and in pursuance of such agreement designated the plaintiff as his beneficiary. In answer to that contention, however, I do not think that the evidence established that this certificate was issued in pursuance of any such contract; but whether so issued or not, it was issued subject to the provisions therein contained and the laws, rules and regulations governing the rank and which may be adopted by the board of control of said rank, and the agreement to pay to the beneficiary was in accordance with and under the rules governing the payment of benefits, and upon the condition that the beneficiary designated should acquire no interest whatever in the certificate nor in the endowment fund until the benefit shall have lawfully accrued by reason of the death of the said member, and that no subsequent change in the beneficiary shall have been made.

The only substantial question presented is, whether the instrument and affidavit forwarded to the defendant on the 13th day of May, 1904, and accepted by the defendant as a sufficient change of the beneficiary under the rules and regulations of the order, was sufficient to change the beneficiary under the certificate of membership and the rules and regulations adopted by the order. Rule 79 of the defendant provides that any person desiring to change the beneficiary or beneficiaries shall make application on a form prescribed by the board of control; that such change may be made at any time and as often as desired, consent of the existing beneficiaries not being

App. Div.]

First Department, February, 1906.

required; but no change of beneficiary shall be valid until its acceptance by the board of control; and rule 80 provides that "In case a member desiring to change his beneficiary shall be unable to surrender the original certificate, or the certificate then in force, by reason of the actor refusal of the beneficiary named therein, or from any other cause, the Board of Control may issue a new certificate upon proof of the facts by affidavit of the member, and the execution by him of such instruments of release or indemnity as shall be deemed necessary." In pursuance of this provision Irvine transmitted to the defendant an instrument by which he made a change in the beneficiary named in said certificate, and he surrendered and released all rights in and to and under said certificate, to take effect upon the issuance to him of a new certificate in lieu and place thereof. The instrument then directed that the benefit was to be paid to Annie Elizabeth Fee, his adopted daughter, and requested a new certificate to be issued to him in accordance therewith to take effect immediately; it stated that he desired to name, and he thereby did name, as his beneficiary his adopted daughter in place of the plaintiff, and he revoked the appointment and named in her place and stead his adopted daughter, Annie Elizabeth Fee. This instrument was duly acknowledged, and attached to it was an affidavit which verified the facts stated, that the plaintiff was not a blood relative, but a sister of his deceased wife; that as the plaintiff was named as beneficiary in said certificate, he was induced by her and her husband to place the said certificate in their possession; that he had made demands upon the plaintiff and her husband for a return and delivery of the certificate, but had been unable to secure the same. Annexed to this was the certificate of the adoption of the said Fee, which appeared to be in accordance with the provisions of the law of the State of Texas where Irvine and the said Fee then resided; and in answer to this communication the secretary of the board of control wrote to the defendant on May 19, 1904, stating that upon Irvine's filing with the board a bond such new certificate would be issued. After the death of Irvine the defendant decided to furnish Mrs. Fee with blanks for proof of death, and declined to recognize the rights of the plaintiff.

Both under the certificate issued to the plaintiff and the rules and regulations of the defendant, a member had a right to change a

beneficiary and the plaintiff acquired whatever interest she acquired in this certificate subject to that right. The conditions under which the defendant was to accept such a change of beneficiary and issue a new certificate were entirely for its protection. If the defendant consented to the change, it could waive any of the conditions which it had prescribed as a condition for issuing a new certificate or recognizing a change in consequence of the inability of a member to surrender the old certificate, and it would seem that the plaintiff could not take advantage of the failure of the defendant to insist upon an observance of these conditions imposed for its own benefit. (*Kimball v. Lester*, 43 App. Div. 27; *affd.*, 167 N. Y. 570; *Dexter v. Supreme Council*, 97 App. Div. 545.)

In *Lahey v. Lahey* (174 N. Y. 146) the original certificate designated the member's wife as the beneficiary, who had possession of the certificate. The member having become separated from his wife, went to live with his mother and subsequently executed an instrument by which he revoked the former certificate and desired that \$500 of the amount due should be paid to his mother and \$500 to the treasurer of the association to pay doctor's and funeral expenses. This instrument was filed with the officers of the association with a request that a new certificate should be issued. The association failed and neglected to issue such new certificate, upon the ground that the original certificate should be surrendered with the application for the change. Subsequent to this proceeding the wife of the member induced him to go with her to her home in the city of Buffalo, where he remained until his death. After his death the plaintiff, who was the wife, claimed the whole of the fund by virtue of the original certificate. The defendant, the member's mother, claimed her interest in the fund under the second designation. Upon these facts the court below found as a conclusion of law that the member changed the beneficiary of said insurance as provided in the instrument of October thirtieth, and that he did what was necessary to effectuate such a purpose.

The principle established in that case, I think, justified this judgment. There can be no question but that the member of the defendant corporation intended to change the beneficiary to whom the payment was to be made upon his death. He communicated that intention to the defendant who accepted the proposed change

App. Div.]

First Department, February, 1906.

and undertook to issue a new certificate upon filing the bond as required by the by-laws of the association. There is nothing in the rules and by-laws that requires that a new certificate should be issued before a change of the beneficiary was accomplished. The change did not consist in issuing a new certificate, but the association required for its own protection that before a new certificate should be issued the old one should be surrendered, or security given to save the association from the expense or liability involved in having two certificates outstanding, naming different beneficiaries. As between this defendant and a person claiming to be the person designated by a member as his beneficiary, the defendant would only be liable if the person making the claim was in fact the person designated by the member as the one to whom the benefit should be paid. There is here, I think, sufficient to sustain the finding of the court below that prior to his death the member had changed the beneficiary, and that the plaintiff, although she held the certificate designating her as the one to whom the amount was to be paid on the death of the member, was not in fact the beneficiary entitled to such payment at the death of the member, and, therefore, was not entitled to recover. The defendant recognized the right of this member to change the beneficiary, has accepted the new beneficiary as the one to whom the benefit was payable, and it seems to me established that the plaintiff was not entitled to the payment which was provided by the constitution and by-laws of this association to be paid to the person who had been designated by the member as the one entitled to the benefit upon his death.

It follows that the judgment appealed from should be affirmed, with costs.

O'BRIEN, P. J., LAUGHLIN and CLARKE, JJ., concurred; HUGHTON, J., dissented.

HUGHTON, J. (dissenting):

I dissent on the ground that the plaintiff holds the only certificate actually issued, no bond having been furnished as a condition of issuing a new certificate, and the action being at law, the plaintiff is entitled, as against the defendant, to recover.

**Judgment affirmed, with costs.**

AUGUSTUS K. SLOAN, Appellant, v. NATIONAL SURETY COMPANY,  
Respondent.

First Department, February 9, 1906.

**Chattel mortgage — on default mortgagee must take possession or refile mortgage — when proof of taking possession sufficient — conversion by sheriff selling under execution — when surety who indemnifies sheriff liable to mortgagee.**

The owner of a chattel mortgage not in possession of the property must, when the debt becomes due, either refile his mortgage or take possession of the property in order to protect himself against levy by a judgment creditor of the mortgagor. Though on default of the mortgagor the title vests in the mortgagee and the mortgagor has only an equity of redemption, the mortgagee to protect his title must take possession.

When the mortgaged property consists of machinery situated in a building leased by the mortgagor, whose lease has expired, except as such mortgagor holds over as monthly tenant, a taking of possession by the mortgagee is established when it is shown that he demanded payment, which was refused, went to the room and claimed the machinery as his, secured a lease of the room containing the machinery from the owner, and employed and paid persons to operate the machinery in finishing up orders.

When such mortgaged property has after default and such possession by the mortgagee been sold by the sheriff under levy by a judgment creditor of the mortgagor, a surety who has indemnified the sheriff is liable for the conversion, although the original levy was made before the bond of indemnity was given.

APPEAL by the plaintiff, Augustus K. Sloan, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 17th day of February, 1904, upon a nonsuit granted by the court after a trial at the New York Trial Term, and also from an order entered in said clerk's office on the 10th day of February, 1904, denying the plaintiff's motion for a new trial made upon the minutes.

*Albert R. Hager*, for the appellant.

*Charles A. Boston*, for the respondent.

McLAUGHLIN, J. :

On the 5th of August, 1897, the plaintiff loaned to the Haney Manufacturing Company, a domestic corporation, the sum of \$5,000, under a written agreement executed on that day, which, among other things, provided that the corporation, for the purpose of securing payment of such loan, should execute and deliver to the



App. Div.]

First Department, February, 1906.

plaintiff bills of sale of its machinery and plant, the corporation, however, to remain in possession and use of the property covered by the bill of sale in conducting its business. The loan was for one year, and if default were made in the payment of the same, then the agreement provided that the legal title should thereupon vest and become absolute in the plaintiff. Pursuant to this agreement the plaintiff received three bills of sale, covering the machinery and property therein specified, one of which was executed by the corporation and two others assigned by a person who had legal title to a portion of the property. Upon their receipt the plaintiff filed them in the register's office in the county of Kings. On the 5th of August, 1898, the day when the loan matured, plaintiff went to the place of business of the corporation, requested payment, and the same being refused demanded, and, as he claims, took possession of all of the property covered by the bills of sale.

On the 29th of July, 1898, the Cycle Age Company of Chicago, Ill., recovered a judgment against the corporation in the Supreme Court of New York for the sum of \$453.16, and an execution was issued thereon to the sheriff of Kings county on the 1st of August, 1898. The sheriff, through his deputy, undertook to enforce the same by going to the place of business of the corporation and there attempted to make a levy, but he was then informed that the plaintiff had bills of sale of all of the property on which a levy was sought to be made, which were on file in the register's office. Before proceeding to perfect the levy and enforce the execution the sheriff demanded a bond of indemnity from the Cycle Age Company and the latter procured the same on August 9, 1898, from the defendant in this action in the sum of \$1,500. Thereafter the sheriff perfected his levy by taking the property into his possession, and advertised the same for sale. The plaintiff demanded that the levy be released and the possession of said property returned, and then a further bond of indemnity was required, in pursuance of which, on the 31st of August, 1898, an additional bond was given by the defendant in the sum of \$2,000, after which the sheriff advertised the property for sale, and the same was sold on the 6th of September, 1898, for \$732. The plaintiff then brought this action to recover the value of such property, on the ground that the same was wrongfully and unlawfully converted by defendant.

There have been two trials. The first resulted in a verdict for the plaintiff for the value of the property sold, but upon appeal the judgment was reversed (*Sloan v. National Surety Co.*, 74 App. Div. 417), this court holding that the bills of sale, when construed in connection with the agreement, were in fact chattel mortgages, and the property covered by them having been permitted to remain in the possession of the mortgagor, the plaintiff, in order to protect his rights, was required, when the loan matured, either to refile his mortgages or take actual possession of the property, and he did not establish that he had done either. At the conclusion of the second trial the defendant moved to dismiss the complaint or for the direction of a verdict, pending the determination of which the court submitted three questions to the jury for special findings thereon: (1) Whether the plaintiff on the 5th of August, 1898, took actual possession of the property; (2) if he did, whether he thereafter retained such possession until the levy by the sheriff; and (3) what damage the plaintiff suffered if he were the owner of the property. The first and second questions were answered by the jury in the affirmative, and the third \$4,611.20. The special verdict was recorded, the jury discharged and the motion to dismiss the complaint granted, to which an exception was taken. Judgment was subsequently entered to this effect, from which the plaintiff appeals.

The learned trial justice was evidently of the opinion that the evidence on the second trial had not been materially changed from what it was on the first trial, and if he were correct in this, then the complaint was properly dismissed under our former decision. There was no evidence that the mortgages were refiled, and the only remaining question is whether the evidence tended to show and was sufficient to sustain a finding that the plaintiff on the 5th of August, 1898, took actual possession of the property covered by the mortgages and thereafter remained in actual possession until the same was taken from him by the sheriff.

On the first trial substantially the only evidence bearing upon the question of possession was that given by the plaintiff himself, in which he stated that when he demanded payment of the loan and the same was refused he demanded and took possession by going into the room, putting his hands on the different pieces of machinery and announcing that the same were his; that none of the machinery

App. Div.]

First Department, February, 1906.

was removed, and after the execution of the several bills of sale the same "was continued in use by the Haney Manufacturing Company in connection with its business \* \* \* up to the time of the sale by the Sheriff." This did not constitute taking actual possession, but at most constructive possession. (*Steele v. Benham*, 84 N. Y. 634.)

On the second trial, however, the plaintiff testified, and the credibility of his testimony in so far as the same was in conflict with that given by him on the first trial was for the jury, that on the 5th of August, 1898 (the day the loan fell due), he demanded payment; that this was refused; that he then went into the room where the machinery was and claimed the property; that he put his hands on all of the machinery and claimed it; that on that day he leased the room in which the machinery was from Mr. Tollner, the owner; that in order to get the lease he had to pay the rent from the first of the preceding July; that he paid the rent for the months of July, August and September. He produced a letter which he wrote to the landlord on the fifth of August, in which he stated: "I will take the floor now occupied by the Haney Mfg. Co. 290 Graham St., Brooklyn, paying you \$100 pr. month for same, subject to a two weeks' notice on either your side or mine, to terminate this agreement, which it is understood to date from July 1st, 1898. Enclosed please find my check for one hundred dollars for July rent, for which please send me receipt & oblige." In this letter was inclosed a check for \$100. He also produced the answer of the landlord, written on the same day, in which he stated: "Replying to your favor of even date, and acknowledging receipt of your check for \$100, to pay the rent for one month ending July 31st, for floor now occupied by Haney Mfg. Co., I would say that I will mail you a properly drawn receipt for same shortly." The check which was inclosed in the letter of August fifth was introduced in evidence. It was dated August fourth, was for \$100, payable to the order of Tollner, was indorsed by Tollner and payment made through the clearing house on the fifth of August. The plaintiff further testified that the Haney Manufacturing Company did no business in the room after the fifth of August and that the only business which was done there was done by plaintiff himself in finishing up orders taken for him, and that all of the persons employed in doing this

business were paid by him or persons representing him with cash which he furnished for that purpose.

As to the leasing of the rooms he was corroborated by Tollner, who testified that on the 5th of August, 1898, he leased to the plaintiff the room in which the machinery was stored; that the lease of the Haney Manufacturing Company expired on the 30th of April, 1898, and it continued to occupy the premises thereafter down to August 5, 1898, merely as monthly tenant, but did not pay the rent for the month of July, and under the arrangement with the plaintiff he paid the rent for that month. He further testified that he received the letter written by the plaintiff on or about the 5th of August, 1898, and that he wrote the one above quoted in reply thereto; that in that letter was the check referred to, which was used by him.

The plaintiff was also corroborated in material respects, both as to his leasing the room on the fifth of August and taking actual possession of the premises on that day, by the witness Haney, who was the president of the Haney Manufacturing Company. He stated that the Haney Manufacturing Company had a lease which expired on the thirtieth of the preceding April, and from that time on it occupied the premises as monthly tenant and as such paid the rent to the first of July; that proceedings were about to be taken to dispossess it for non-payment of rent, and on the 5th of August, 1898, the plaintiff leased the premises which it had previously occupied; that on that day he demanded payment of his loan, which was refused, and thereupon he went into the factory, put his hand on each machine, each piece of goods, and said: "This is my property." This witness further testified that no work was thereafter done in this room by the Haney Manufacturing Company; that the plaintiff employed and paid a few persons to finish up an order which he had taken; that the last payroll of the Haney Manufacturing Company was either the last of June or first of July; that the last business which the corporation did was early in July. The plaintiff was further corroborated by the witness Holland, the secretary of the Haney Manufacturing Company, who testified that the last check drawn by the company was on the 13th of June, 1898; that on the fifth of August following the corporation was not doing any work in the room; that after that date there were one or two girls and possibly one or two men who were

App. Div.]

First Department, February, 1906.

employed to finish some work for the plaintiff; that the witness paid these employees with money furnished by the plaintiff. The testimony of these witnesses was not disputed or contradicted in any way, inasmuch as the defendant offered no evidence, except in so far as the same was discredited by cross-examination, and I am clearly of the opinion that there was not only sufficient evidence to go to the jury upon the question of whether the plaintiff on the fifth of August took and thereafter remained in actual possession until after the levy was made, but that a finding to the contrary would be against the weight of evidence.

When default occurred in payment of the amounts secured by the chattel mortgages, the legal title to the property covered by them vested absolutely in the plaintiff, and the only interest which the Haney Manufacturing Company thereafter had was the mere naked equity of redemption. (*Casserly v. Witherbee*, 119 N. Y. 522; *Charter v. Stevens*, 3 Den. 33; *Stoddard v. Denison*, 38 How. Pr. 296.) In order, however, to protect this right it was necessary for the plaintiff to take actual possession, but in doing so it was not necessary for him to remove the machinery to some other room or take it into the street and then carry it back into this room. He could just as effectively take actual possession by taking possession of the room in which the machinery was and excluding the Haney Manufacturing Company therefrom. This is precisely what the jury was justified in finding from the evidence that he did. He claimed he was entitled to possession, which fact was recognized by the mortgagor by its acquiescing in the correctness of his claim. He went into the room where the machinery was, looked it over and announced that he took possession and that it belonged to him. He leased the room and paid the rent and thereafter the mortgagor ceased to do any work in the room or do any act hostile to or inconsistent with plaintiff's possession. The fact that Haney, the president of the company, was occasionally about the room, or that Holland, the secretary, volunteered to disburse plaintiff's money in paying the employees, could not destroy plaintiff's interest if he had previously obtained possession. What else should he have done? It is difficult to suggest an answer. He had done all, as it seems to me, that the law required. The jury, therefore, was justified, from the evidence, in finding that the plaintiff on the 5th of August, 1898,

took and thereafter continued in actual possession of the property until the same was taken from him by the sheriff, and that he had been damaged to the extent of the value of the goods.

If I am correct in this, then the trial court erred in dismissing the complaint. It should instead under the stipulation have directed a general verdict in favor of the plaintiff for \$4,611.20, the value, as found by the jury, of the goods taken by the sheriff.

The defendant, as already indicated, gave the bonds to indemnify the sheriff in making the sale, but, notwithstanding that fact, it strenuously urges that it cannot be held liable for conversion of the property inasmuch as it did nothing further. This same question was presented on the former appeal, and in reversing the judgment then appealed from and ordering a new trial we necessarily determined (otherwise there would have been no occasion for ordering a new trial) it adversely to the contention. The sheriff refused to sell the property until he had received bonds indemnifying him against damage. The defendant gave the bonds which brought about the sale, and by that act made itself liable as principal for the original wrongful seizure, as well as for the sale. (*Dyett v. Hyman*, 129 N. Y. 351; *Ball v. Loomis*, 29 id. 412; *Herring v. Hoppock*, 15 id. 411; *Cassani v. Dunn*, 44 App. Div. 248; *Posthoff v. Bauendahl*, 43 Hun, 570; *Davis v. Newkirk*, 5 Den. 92.) The defendant, by the mere act of giving the bonds, induced the sheriff to do an unlawful act, in which it participated. It, therefore, became jointly and severally liable with the sheriff for all the damages sustained, to recover which the plaintiff could, at his option, maintain an action against them jointly or severally. (*Wehle v. Butler*, 61 N. Y. 245; *Van Dewater v. Gear*, 21 App. Div. 201; *Rose v. Oliver*, 2 Johns. 365.)

If the foregoing facts be correct, then it follows that the judgment and order appealed from must be reversed; and while this court has the power to direct judgment for the plaintiff on the special verdict, we think that justice will be best subserved in this case by ordering a new trial.

O'BRIEN, P. J., INGRAHAM, LAUGHLIN and CLARKE, JJ., concurred.

Judgment and order reversed, new trial ordered costs to appellant to abide event.

App. Div.]

First Department, February, 1906.

HARRY J. HEARN, Appellant, v. CHARLES A. STEVENS & BRO.,  
Respondent.

First Department, February 9, 1906.

**Contract of employment on commission — contract construed in light of existing conditions — when plaintiff entitled to commissions on sale of goods removed from his control.**

A contract of employment for a fixed time which gives to the plaintiff certain commissions on the sales of "cloaks and suits now known as Departments Nos. 21 and 18" entitles such plaintiff to commissions on cloaks and suits which at the time of contract were sold in these departments, but which during the term of the contract were transferred by the defendant to other departments. Such contract must be interpreted in view of the conditions existing at the time of contract.

A plaintiff is not precluded from asserting his rights under such contract by not objecting to the transfer of portions of said goods to other departments.

APPEAL by the plaintiff, Harry J. Hearn, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 17th day of June, 1905, upon the dismissal of the complaint by direction of the court at the close of the plaintiff's case on a trial at the New York Trial Term.

*Herbert H. Maas* [*Charles Grossman* with him on the brief] of counsel; *Morris J. Hirsch*, attorney for the appellant.

*Abram I. Elkus* [*William R. Bayes* with him on the brief] of counsel; *James, Schell & Elkus*, attorneys for the respondent.

CLARKE, J. :

This action was brought to recover \$3,077.59 as unpaid commissions alleged to be due under a written contract of employment of the plaintiff by the defendant for the term of three years. The plaintiff entered upon the period of service under the contract and completed the same. By the terms of the contract plaintiff was to act "in the capacity of assistant manager of the departments herein mentioned for a term of three (3) years at a salary which shall equal four (4) per cent of the gross profits on the net retail sales of the cloaks and suits now known as Departments Nos. 21 and 18, and

additional bonus hereinafter mentioned, and party of the first part guarantees to the party of the second part that said amount will not be less than Four thousand six hundred and forty (\$4640) dollars per year." The plaintiff was "to devote his whole time, best energy and ability to the promotion of the welfare of the business." He was to be paid seventy or seventy-five dollars each week and agreed "to accept that as payment in full for his services should he at any time by any act or failure on his part to perform his duty as set forth in this contract terminate said contract before two (2) years."

"It is understood and agreed that the difference between Three thousand six hundred and forty (\$3640) dollars (being fifty-two weeks at seventy (\$70) dollars per week) and the four (4%) per cent of the profits on the net retail sales for the year shall at the end of the first year be placed to the credit of the party of the second part and remain as a penalty for the fulfillment of this contract by the party of the second part for the second year. At the end of the second year the aforesaid commissions are to be paid to the party of the second part, and the commission for the second year placed to his credit on the same terms and conditions as before. Upon the completion of this contract at the end of the third year the commissions for the second and third years are to be paid in one lump sum together. The party of the first part hereby guarantees that said commission shall not be less than One thousand (\$1000.00) dollars each year for the three (3) years." "Party of the first part agrees to pay to party of the second part as a further commission, or extra bonus, one-half of one (1) per cent of the net retail sales of the above department in excess of Four hundred thousand (\$400,000) dollars."

The defendant had a large establishment in the city of Chicago. At the time the contract herein was made, and at the time the period of service provided for began, cloaks and suits were sold at retail in departments 18 and 21 of said establishment. It was of these departments that plaintiff was made manager, and it was upon the net retail sales of the cloaks and suits therein that he was to receive four per cent of the gross profits; and if the net retail sales of the said departments exceeded \$400,000 he was to receive an extra bonus of one-half of one per cent. The same goods continued to be sold in those departments during 1901, the first year of employment, and part of the year 1902. In the fall of 1902 the



App. Div.]

First Department, February, 1906.

misses' cloaks and suits were taken from departments 21 and 18, and, with children's cloaks and suits, were thereafter sold in a new department known as 24. This new department 24 was considered by the defendant to be within the terms of the contract, and plaintiff was paid for the whole period four per cent of the gross profits of the net retail sales of departments 18, 21 and 24, and, the sales of said departments having exceeded \$400,000, one-half of one per cent additional bonus. In June, 1902, the cheaper grades of goods in departments 18 and 21, cloaks and suits, were taken therefrom and, together with furs, waists and millinery, were placed in another new department known as the "Wabash Annex." The plaintiff had been asked his opinion in regard to this change, and said that he thought it a good one. Thereafter and before the annex was opened the president of defendant handed plaintiff a paper reading: "Commencing with May first, 1902, the following additional commissions will be added to your salary: From the Wabash Annex \$2.50 for each \$1,000 sales made in that department on your lines. Also, four per cent of the gross profits on the net retail sales of silk dress skirts. Also one-half of one per cent of the net retail sales of silk dress skirts over \$100,000, or in other words, one-half of one per cent on the total net retail sales of departments 21 and 18 over \$500,000, with the silk skirts included in one of these departments. These extra commissions to become due and payable according to our regular contract and added as an addition to the compensation therein mentioned."

The plaintiff testified that he told Mr. Stevens that he would take this paper home and look it over; that the next morning he returned the paper, telling him that "I would not sign it; that I knew that under the arrangement that we had that he would use me all right, which he said he would, and that I stood ready at any time to do the buying or anything that I was asked to do." The plaintiff further testified that in another conversation with Mr. Stevens, the president of the defendant, Mr. Stevens informed him that he had a buyer for the annex department, "which I objected to, and I told him that I thought that when he asked me in the first place about it, it would be under the same management of his brother and myself and conducted in that way according to my contract; and he informed me that he could hire as many buyers as he wished."

The plaintiff has been paid the four per cent on all cloaks and suits sold in departments 18, 21 and 24, and the one-half of one per cent on such sales over \$400,000. He has also received one-half of one per cent on the sales of the cloaks and suits in the annex. His claim is that the cloaks and suits so sold in the annex were goods which were in departments 18 and 21 at the time of the making of the contract and of the commencement of his employment thereunder, and hence were included within the terms thereof, and that, instead of one-half of one per cent, he should have been paid four per cent, and it is for that amount he sues.

The plaintiff was the only witness examined, and when his case was closed the learned court granted the motion to dismiss, saying: "There is nothing in the contract between the defendant and the plaintiff that prevented the defendant from opening and operating the so-called annex department. \* \* \* There was no right in the plaintiff under the contract in suit to receive any compensation whatever upon any of the business done in the annex. \* \* \* If the employee, the plaintiff in this case, desired to place any limitation or restriction upon the authority of the defendant as to subsequent changes he should have required by putting language and provision in the contract giving him the exclusive right during the period of his employment to the control of so much of the business of the defendant as was then embraced in those departments."

It will be noted that the contract was for three years; that the amount of the salary depended upon the gross profits made in the departments, being a fixed percentage upon such profits, and that such percentage was to be reckoned "on the net retail sales of the cloaks and suits now known as Departments Nos. 21 and 18." It seems to me clear that the only reasonable interpretation of this contract is that it was intended to and did cover the cloaks and suits then sold in said departments. Those cloaks and suits were known to both parties. That construction makes the contract clear and determinate. Any other construction would leave it uncertain and loose, and might lead to absurd results. This construction was acted upon by the defendant. When it created department 24 out of 18 and 21 by sending into that department some of the articles theretofore dealt in in 18 and 21, it paid without question the agreed percentage upon all sales in that new department. Why

App. Div.]

First Department, February, 1906.

should defendant consult plaintiff about the opening of the Wabash annex, tender him the paper writing in respect thereto, and actually pay to him one-half per cent commission on sales therein "on your lines," unless it realized that it was restricted by the contract? It seems obvious that the defendant knew that plaintiff had a good claim and attempted to adjust it by a supplementary agreement.

Counsel for the defendant suggests that plaintiff is precluded by his conduct from making this claim. It does not seem to me that plaintiff could justly be asked to jeopardize his contract by threats, disputes or litigation during its continuance. It was for three years. It was valuable. The defendant had secured peace for itself by providing that \$70 or \$75 a week should be full payment for his services "should he at any time by any act or failure on his part to perform his duty as set forth in this contract terminate said contract before two (2) years." Further, it had provided that all of his remuneration beyond \$3,640 a year would be placed to his credit "and remain as a penalty for the fulfillment of this contract" by plaintiff for the next year. What stronger inducement could there be for waiting until the termination of the contract before seeking to enforce his legal rights? Having insured itself against trouble defendant should not be heard to complain that it was not made.

If the defendant's interpretation of the contract is correct, as found by the trial court, that it had the right to open as many departments as it pleased, then not only this one line of goods could have been taken from the plaintiff, but all his lines could have been taken away, and hence there could have been no sales in departments 21 and 18 of cloaks and suits, no gross profits thereon, and so nothing on which to calculate his percentage.

In *Horton v. Hall & Clark Mfg. Co.* (94 App. Div. 404) plaintiffs had a contract to sell the goods of defendant, a manufacturing company, for a year on a commission of five per cent. The defendant sold out its business and ceased manufacturing within the year. The defendant claimed that the contract was not sufficiently definite to obligate it to manufacture any particular quantity, or continue manufacturing, or to prevent the transfer of its business, and that even if it were guilty of a breach of the contract, only nominal damages were recoverable. This court said: "We think it clear that in making this contract there was an implied agreement on

the part of the defendant to continue manufacturing throughout the year, and that in suspending manufacture and transferring its business it was guilty of a breach of the contract," and sustained a recovery.

In *Wells v. Alexandre* (130 N. Y. 642) the defendants agreed to purchase from the plaintiff at a certain specified price all coal necessary for the use of certain steamships running on a steamship line between New York and Cuba, of which they were the owners during the year 1888. During that year the defendants sold the said steamers and ceased to operate them. The court said: "The evident intention of the parties was that the plaintiff should furnish to the defendants all the coal which the steamers named should require in the work in which they were employed for the year ensuing and that the parties should perform all needful acts to give effect to the agreement; therefore, if a notice was requisite to its proper execution, a covenant to give such notice will be inferred, for any other construction would make the contract unreasonable and place one of the parties entirely at the mercy of the other. \* \* \* The fact that the defendants deemed it best to sell the steamers cannot be permitted to operate to relieve them from the obligation to take the coal which the ordinary and accustomed use of the steamers required."

In *Russell v. Allerton* (108 N. Y. 288) it was held that when there is uncertainty or doubt as to the meaning of words or phrases used in a contract, in seeking for the intent of the parties as evidenced by the words used, the fact that a construction contended for would make the contract unreasonable and place one of the parties entirely at the mercy of the other, may be properly taken into consideration.

In *Wilson v. Mechanical Orguinette Co.* (170 N. Y. 542) the court said: "While it is true that the vicissitudes of business might have compelled the termination of the contract before its expiration by limitation, it is obvious that no such contingency ever arose. \* \* \* Both parties assumed the hazard of an enterprise that might prove unprofitable, but neither of them incurred the risk of having the other voluntarily incapacitated from the honest observance of their mutual compact. \* \* \* The contract is of such a nature that the defendant assumed the implied duty of doing nothing

App. Div.]

First Department, February, 1906.

that would render it incapable of performing its part thereof. By necessary implication from the language and subject-matter of the contract, the defendant is still bound to do that which it might have done and could have been compelled to do if it had continued its business after 1887 as it did before that. \* \* \* In speaking of implied promises Judge FINCH \* \* \* (in *Genet v. D. & H. Canal Co.*, 136 N. Y. 593) said: 'They always exist where equity and justice require the party to do or to refrain from doing the thing in question; where the covenant on one side involves some corresponding obligation on the other; where by the relations of the parties and the subject-matter of the contract, a duty is owing by one not expressly bound by the contract to the other party in reference to the subject of it.'

It seems to me that these cases establish the rule that the contract must be interpreted in view of the conditions existing at the time the arrangement was entered into, and that if the continuance of those conditions is necessary to the proper performance of the contract, a provision is to be implied that neither party is voluntarily to change those conditions to the detriment of the other. Applied to the case at bar, the provision to be implied was that the cloaks and suits then sold in the department over which plaintiff was placed should be continued therein, and if not, that he should still be entitled to his commissions on their sale. It follows that it was error to dismiss the complaint. Of course this opinion is upon the record as we find it. The defendant has not been heard. It may be able upon its proof to establish a good defense. But as upon a dismissal the plaintiff is entitled to the most favorable view of the evidence, we hold that he has made out a *prima facie* case.

The judgment should be reversed and a new trial granted, with costs to the appellant to abide the event.

O'BRIEN, P. J., INGRAHAM, McLAUGHLIN and LAUGHLIN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

ST. REGIS PAPER COMPANY, Respondent, v. WATSON PAGE LUMBER  
COMPANY, Appellant.

Third Department, January 8, 1906.

**Assignment — parol assignment of written contract — when assignee can  
recover thereon — erroneous charge.**

When the defendant has contracted with the plaintiff's assignor, from which it leased a saw mill "and all present facilities for manufacturing and handling lumber," to return at the termination of the contract as many feet of lumber used as "crossers" in lumber piles as it now holds or pay for any not so returned, the plaintiff under a parol assignment of said contract can recover from the defendant the sum agreed to be paid for "crossers" not returned.

Such recovery cannot be defeated on the ground that title to the leased property did not pass under an assignment of the lease to the plaintiff, for the plaintiff is an assignee of the defendant's contract to pay for "crossers" not returned.

When, however, the plaintiff as assignee of said contract and as grantee of the saw mill seeks to recover the value of certain "covers" used for protecting lumber piles, which "covers" were not mentioned in the contract of the defendant with the assignor, unless considered to be covered by the phrase "all present facilities for manufacturing and handling lumber" contained in the lease of the saw mill, it is error to charge that the plaintiff can recover such leased property of the defendant as assignee of a contract not mentioning said "covers," for the presumption is that the title to said "covers" remained in the assignor.

APPEAL by the defendant, the Watson Page Lumber Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Franklin on the 20th day of March, 1905, upon the verdict of a jury, and also from an order entered in said clerk's office on the 18th day of March, 1905, denying the defendant's motion for a new trial made upon the minutes.

On the 29th day of August, 1898, the Santa Clara Lumber Company, a domestic corporation, was the owner of about 57,500 acres of timber land in the county of Franklin. It also owned a saw mill and lumber yard. On that day it entered into a contract in writing with the defendant, the Watson Page Lumber Company, by which it agreed, in substance: *First*, to sell and deliver to the defendant a large quantity of logs, not less than 2,000,000 feet and not more than 3,000,000 feet per year, for five years; and, *second*, to lease

App. Div.]

Third Department, January, 1906.

its said "saw mill, \* \* \* together with its planing mill, lumber yard, side track, \* \* \* and all present facilities for manufacturing and handling lumber, for a period of five years from April 1st, 1899, at the annual rental of two thousand dollars, payable monthly in advance." The 9th paragraph of such contract reads as follows: "*Ninth.* The Watson Page Lumber Company agrees to return at the termination of this contract as many feet of lumber used as crossers in lumber piles as it now holds or pay for any not so returned at the rate of six dollars per thousand feet."

On May 29, 1899, the said Santa Clara Lumber Company sold and conveyed such timber lands to the plaintiff, the St. Regis Paper Company. Through inadvertence the saw mill property was omitted from the description contained in such deed, and on the third day of July following the Santa Clara Lumber Company executed a deed to supply such omission.

At the time of the execution of the contract above mentioned by the Watson Page Lumber Company it received with said mill and lumber yard from the Santa Clara Lumber Company 225,916 feet of "crossers" and 46,100 feet of "covers" or boards which were used to cover lumber piles. At the termination of said contract the plaintiff, claiming to be the assignee thereof, demanded from the defendant such crossers and covers, and upon a refusal to deliver the same brought this action to recover their value. Upon the trial the court held as matter of law that the crossers were included within the contract and passed by the assignment thereof to the plaintiff and directed a verdict in the plaintiff's favor for their value as fixed by the contract, but directed the jury to determine whether the value of the covers should be added thereto. The court instructed the jury that, if the covers were received by the defendant as leased property, the plaintiff was entitled to recover for the same. The jury rendered a verdict for the value of both crossers and covers, and from the judgment entered thereon and from an order denying the defendant's motion for a new trial made on the minutes this appeal is taken.

*John P. Badger*, for the appellant.

*Elon R. Brown*, for the respondent.

PARKER, P. J. :

As to the "crossers" for which the plaintiff seeks to recover in this action, the defendant received them from the Santa Clara Lumber Company, and it is clear that the plaintiff must show that it has succeeded to such lumber company's interest therein before it can maintain this action. It is also clear from the evidence in this record that this plaintiff entered into a parol contract with such lumber company to purchase all the timber lands mentioned in the contract between such lumber company and the Watson Page Lumber Company, which is set forth in the complaint herein, and also to purchase the mill, lumber yard, etc., with the appurtenances and fixtures thereto belonging, and also all the rights and interests of such lumber company in such contract, and to assume all the obligations of such Santa Clara Lumber Company therein specified, and that this plaintiff, in pursuance of such agreement, not only paid the price agreed upon, but stepped into the place of the lumber company and also fully performed with the defendant all the obligations which the lumber company had thereby agreed to perform. These facts are so clearly proven that they are hardly denied on the part of the defendant. In performance of such agreement on its part, the Santa Clara Lumber Company executed conveyances of the lands in such agreement specified. It also drew up an assignment of such contract and submitted it for the approval of this plaintiff, and the contract so submitted was, in its terms, entirely satisfactory to this plaintiff. Such instrument, however, was never signed by either party, but each of them proceeded to act under the agreement and it was ultimately carried out by both the parties thereto and by the Watson Page Lumber Company as if such submitted assignment had been actually executed. We may, therefore, assume that a parol assignment of the contract was actually made from the lumber company to this plaintiff and that the terms thereof were as in such submitted assignment expressed.

That the mill and the lumber yard and fixtures were actually sold and conveyed to this plaintiff and the said written contract and all of the lumber company's interest therein was actually assigned to the plaintiff is fully established. But the question is: Were the crossers and covers, for which this action is brought, thereby sold and transferred to this plaintiff?



App. Div.]

Third Department, January, 1906.

It is claimed by the defendant that it does not appear that either of such articles of personal property were included in the parol agreement between the lumber company and this plaintiff, above referred to. It urges that, as to the crossers, they, at most, were personal property leased to the defendant with the mill, and that the sale of the mill and a transfer of the lease by the lessor, viz., the lumber company, would not operate to transfer the title to the property leased, and thus it took no interest therein by an assignment of such contract. True, if it is to be considered that the crossers were taken and held by the defendant merely as property leased to it for a term of five years. But by the 9th clause of such contract the defendant received the crossers under an agreement to return at the termination of the contract as many feet of lumber as it then held of "crossers," or to pay therefor at the price of six dollars per thousand. By this agreement the defendant held such crossers, not merely as a lessee, subject to the rights and obligations which the law imposes upon such a relation, but it had the right to use and convert to its own use all of such crossers at any time and pay therefor at the agreed price of six dollars per thousand. In other words, the defendant held the crossers not as a lessee, but under the contract obligation above specified. The defendant's counsel, in his points and upon the argument, declares it to have been a sale of such crossers to the defendant, which I am inclined to think is a correct construction of the transaction; and in that case an assignment of such contract would, in my judgment, transfer to the assignee all of the lumber company's rights to demand from the defendant the payment which by the terms of the contract so assigned it had contracted to pay. At the time of the assignment of such contract the rights of the lumber company in these crossers did not rest in the fact that it had the title thereto because, as against the defendant company, it could not claim that it had it, but in the contract obligation on the part of the defendant contained in such 9th clause to pay for them either in lumber or cash at the end of the term. Such contract obligation was transferred with the assignment above referred to, and hence the plaintiff succeeded to the right of the lumber company to demand such payment from this defendant. The objection, therefore, that the title to leased property does not pass with the assignment of the lease is not applicable to this case.

As to the "covers" there is no mention made of them, by that name, in the contract between the lumber company and this defendant. They were in the lumber yard, however, at the time such contract was entered into, and were received by the defendant by reason thereof. The trial court left to the jury the question whether, by the phrase "and all present facilities for manufacturing and handling lumber," it was intended to include such covers as a part of the property leased. The jury have decided that it was so intended, and we may on this appeal so construe such contract. But, viewing that part of the contract which in its 2d clause refers to the mill, lumber yard, etc., as a lease merely, and the covers as leased property merely, the defendant urges the objection that as to them the assignment of such contract, or lease, did not transfer any of the property so leased; that, therefore, as to those covers there is no evidence that the plaintiff has in any way acquired any title thereto or right to demand the same.

The trial court instructed the jury that if such covers were included in such contract as "*leased*" property, the plaintiff could recover their value. The action and the recovery seem to be based upon the theory that, in that event, the transfer of the contract, or lease, would vest the ownership of the leased property in the plaintiff, and, therefore, it could maintain "*trover*" against the defendant as a lessee who refused to surrender up the leased property on demand after expiration of the lease. I am of the opinion that this view of the case is error. Assuming that the defendant held the covers as a lessee from the Santa Clara Lumber Company, and such company made no other transfer of its rights than by an assignment of such contract, or lease, its rights to demand such covers on the expiration of the five years would remain in the lumber company, and the plaintiff would take no right therein. (*Demarest v. Willard*, 8 Cow. 209; *Huerstel v. Lorillard*, 6 Robt. 260, 262; 7 id. 251, 267.)

If there were evidence of a parol sale of such covers independent of the deeds and of the assignment of such contract, and if such evidence were so conclusive that we could assume, as matter of law, that such a sale was made, we might affirm this judgment on the theory that the verdict of the jury was correct, although as to the covers it was reached upon an incorrect line of reasoning. But while, upon the whole case, there is little doubt but that a transfer

App. Div.]

Third Department, January, 1906.

of such covers was intended between the parties, yet the evidence was not so clear and undisputed as to warrant us in now holding that they were so sold, and that the trial court was authorized to withhold that question from the jury. Without a finding of the jury upon that question, we may not say that the instruction of the trial court as to the plaintiff's title to the covers was harmless.

The defendant's counsel takes several exceptions to the admission and rejection of evidence by the trial court; I am of the opinion that neither of them was a harmful error for which the judgment should be reversed.

My conclusion is that so much of the judgment as affects the plaintiff's claim made and set forth in the first cause of action in its complaint, viz., its claim for the crossers, should be affirmed, and that so much thereof as affects its claim for the covers, as set forth in its second cause of action in said complaint, is erroneous and should be reversed, and that as to such second claim a new trial should be had.

All concurred; KELLOGG, J., not sitting.

So much of the judgment and order as affects the plaintiff's claim made and set forth in the first cause of action in its complaint, to wit, its claim for the crossers, unanimously affirmed, and so much thereof as affects its claim for the covers, as set forth in the second cause of action in said complaint, reversed, and as to such claim a new trial granted, without costs in this court.

---

W. H. PIPER and W. D. PIPER, Respondents, v. JOHN C. SEAGER,  
Appellant.

Third Department, January 8, 1906.

**Partnership**—when new partnership cannot recover on unperformed contract of sale made by former partnership—amendment of pleading—when error to refuse to allow vendee to amend answer to allege breach of contract.

When a partnership has contracted to sell and deliver a certain quantity of coal at a stated price, and when at a time when said contract is partly performed the partnership is dissolved by the retirement of one partner and a new partnership is formed, which new partnership, after a few deliveries, refused to

complete said deliveries as agreed in the original contract, there can be no recovery from the vendee by the new partnership on the original unperformed contract of the old firm.

In such action it is error to refuse to allow the vendee to amend his answer so as to set up the breach of said contract.

APPEAL by the defendant, John C. Seager, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Cortland on the 4th day of May, 1905, upon the verdict of a jury rendered by direction of the court after a trial at the Cortland Trial Term, and also from an order entered in said clerk's office on the 18th day of April, 1905, denying the defendant's motion for a new trial made upon the minutes.

This action is brought by the plaintiffs, W. H. Piper and W. D. Piper, doing business under the style and name of W. H. Piper & Co., to recover for a quantity of coal alleged to have been sold by the plaintiffs and delivered to defendant in the month of March, 1903, at the agreed price of \$1.30 per ton F. O. B. at their mines in Pennsylvania, the whole number of tons so delivered being 1,576<sup>83</sup>/<sub>113</sub>, and the price thereof so sought to be recovered being \$2,049.76.

The defendant, for an answer thereto, *first*, denied all the averments of such complaint; *second*, set forth a counterclaim thereto.

To such counterclaim a reply was served, but which in no manner explained or enlarged the said claim of the plaintiffs as set forth in their complaint.

Upon these pleadings the case came on for trial, and the court, after hearing the evidence, directed a verdict for the plaintiffs for the amount claimed in the complaint, and from the judgment thereon entered, and from the order denying a new trial upon the minutes, the defendant takes this appeal. Further facts appear in the opinion.

*O. U. Kellogg*, for the appellant.

*James F. Dougherty*, for the respondents.

PARKER, P. J.:

It seems that some time prior to February, 1903, there was a firm consisting of this plaintiff, W. H. Piper, and one Lewars, doing

App. Div.]

Third Department, January, 1906.

business under the firm name of W. H. Piper & Co., which for many years had been miners and sellers of soft coal in the State of Pennsylvania, and that in such month of February they entered into a contract by written correspondence with this defendant, by which they agreed to ship to Wickwire Brothers, at Cortland, in the State of New York, 20,000 tons of their coal between April 1, 1902, and April 1, 1903, in equal monthly shipments, at the rate of one dollar and thirty cents a ton on board the cars at their mines, and this defendant agreed to pay therefor.

On January 1, 1903, and while this contract was outstanding, such firm was dissolved, Lewars withdrew therefrom, and the plaintiff W. D. Piper, who was the son of the other member, W. H. Piper, then joined with him in the continuance of such business, and continued to carry it on under the same name and style that the prior firm had always used, viz., W. H. Piper & Co., and they claim that at that time they sent out a printed notice of such dissolution to all the customers of the old firm, including this defendant. The mines and the assets of the old firm seem to have been taken by this new firm, and the general business of mining and selling coal seems to have been continued without interruption by such new firm. At the time of the creation of such new firm there had been delivered to Wickwire Brothers on such contract by the old firm some 5,000 or 6,000 tons. The new firm continued to deliver thereon during January and February some 700-odd tons, which were paid for by the defendant. In March the plaintiffs delivered the number of tons set forth, and which is claimed for in this complaint, and then notified the defendant by letter, dated April 1, 1903, that they would deliver no more upon such contract, but considered it completed so far as they were concerned. At this time there were some 12,000 tons back and undelivered upon such Wickwire contract. It is to be noticed that there is no evidence in the case that the defendant ever made any contract whatever with the new firm for the purchase from it of any coal whatever, and the only request by the defendant that it deliver any coal that appears from this record is that contained in the letter of January 19, 1903, and from which it is evident that he considered the "W. H. Piper & Co.," to whom he was writing, as the old firm, and the defendant distinctly testified that he never received the notice of dissolution,

and that at that time he did not know of the existence of the new firm. And it is to be further noticed that in no letter written by the new firm is there any claim that it was not liable to perform the Wickwire contract, so called, save for the reason that, owing to strikes and causes beyond their control, for which provision was made in the contract, it could not perform the same.

It is apparent, therefore, that the coal for which the plaintiffs seek to recover was never purchased from them by this defendant; no contract concerning it was ever made between the plaintiffs and this defendant, and, therefore, they have been allowed to recover upon a cause of action which was not stated in their complaint.

Moreover, it is also apparent that the contract under which this coal was delivered to the defendant in the month of March and paid for by him in the months of January and February, was purchased from the old firm, and the old firm is still in default in the performance of that contract on its part, something over 12,000 tons being yet due defendant thereon, and if the plaintiffs are to be allowed to recover in this action for coal purchased upon that contract, it would seem very clear that the defendant should have been allowed to plead as a defense to that action the breach of the contract under which such coal was purchased, and yet the trial judge refused to let the defendant amend his answer in any particular. Not only have the plaintiffs been allowed to recover upon a contract that they did not set forth in their complaint, but also upon a contract that was never made with them but with an entirely different party, and the judgment that is rendered in favor of these plaintiffs would not bar an action if brought by the old firm for the same coal. This seems to be clear error for which this judgment should be reversed and a new trial granted.

All concurred.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

MARGARET E. MCAULEY, as Administratrix, etc., of HUGH MCAULEY, Deceased, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Third Department, January 8, 1906.

**Negligence — death of engine driver by collision with derrick of wrecking train — failure of wrecking crew to give warning — negligence of fellow-servant.**

The plaintiff's intestate, while driving the defendant's engine, was struck and killed by the arm of a derrick engaged in removing wreckage from an adjoining track, which arm extended over the track upon which the intestate was driving, which was in other respects unobstructed and safe. The negligence charged was the failure of the crew of the wrecking train to flag the engine which plaintiff's intestate was driving.

*Held*, that assuming said negligence, it was that of the intestate's fellow-servants, for which the defendant was not liable;

That the fact that the flagman was employed on the wrecking train did not make him the master's *alter ego*.

APPEAL by the defendant, The New York Central and Hudson River Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Albany on the 7th day of April, 1905, upon the verdict of a jury for \$6,000; and also from an order bearing date the 3d day of April, 1905, and entered in said clerk's office denying the defendant's motion for a new trial made upon the minutes.

The plaintiff's intestate was a passenger engineer in the employ of the defendant. On the morning of February 27, 1901, he received orders to take a light engine and train crew and run west on track 2 on defendant's road from Albany to Rotterdam Junction. Such run was to be made as a third section of train 37. The first section of such train, consisting of a regular passenger train, left Albany at the usual time, and passed through Schenectady at three-twelve that morning. A wreck had occurred on track 4 at a curve in the road about one and three-fourths miles west of Schenectady, and the wrecking train was ordered out and proceeded westward from Albany to Schenectady on track 2, and thence on track 3 to the place of the wreck, following such first section and passing Schenectady at three-thirty-five. At the place of the wreck there were

four tracks, numbered from the south, viz.: 1, east-bound passenger; 2, west-bound passenger; 3, west-bound freight; 4, east-bound freight. Such wreck did not obstruct track 2, but in the work of removing the wreckage from track 4 the crane of the steam derrick on the wrecking train projected over track 2 and caused a temporary obstruction to trains passing on such track. A second section of train 37, consisting also of only an engine, with a train crew, followed the wrecking train on orders similar to those received by plaintiff's intestate, and passed through Schenectady at four-eight. Such engine was flagged and stopped by Wrafter, a trainman from the wrecking train, after which it continued westward on track 2 past the wrecking train without mishap. The engine which was being run by plaintiff's intestate followed ten minutes later at the rate of twenty-five or thirty miles an hour, but collided, however, with such crane, and the plaintiff's intestate thereby received injuries from the effects of which he died on the following day. The plaintiff thereupon brought this action to recover for the loss thus sustained, claiming that such death occurred through the negligence of the flagman Wrafter in not also giving to deceased a proper signal of danger. The jury rendered a verdict in favor of the plaintiff for \$6,000, and from the judgment entered thereon, and from an order denying defendant's motion for a new trial made on the minutes, this appeal is taken.

*William P. Rudd*, for the appellant.

*Andrew J. Nellis* and *Pierre E. Du Bois*, for the respondent.

PARKER, P. J.:

If it be conceded that this accident happened by reason of Wrafter's negligent omission to give the danger signal to McAuley, yet the question remains whether the defendant is responsible for that negligence. It is conceded that it would not be so responsible if Wrafter is to be considered a coemployee with McAuley; but the plaintiff claims that because Wrafter was employed upon the train that hauled the wrecking car, and which was in attendance upon such car only, and because such car with its "wrecking crew" was engaged only in the clearing of wrecks as they occurred upon the road, he should not be deemed a coemployee with an engineer



who was engaged in hauling the defendant's freight or passenger trains. His theory, as I understand it, is that the defendant's duty requires it to furnish to all its employees a safe and unobstructed roadbed and tracks over which they are required to run; that this wrecking train is one of the means which the defendant uses in performing that duty, but inasmuch as the defendant cannot delegate that duty to any one so as to relieve itself from responsibility for its not being done, those that are so employed must be deemed to be working in its place, must be considered while performing such work as representing it, and that, therefore, Wrafter, while so at work, was the *alter ego* of the defendant, rather than a coemployee with McAuley.

The obstruction that this wrecking train was sent out to remove was upon track No. 4 only. It did not in any way interfere with running over track No. 2. But in the operation of removing such obstruction from No. 4 it happened that the boom of the derrick, at times, would extend over and temporarily obstruct No. 2; and it was against such temporary obstruction that McAuley should have been warned.

It is conceded by plaintiff's counsel that if a train running on track No. 1 had run off and obstructed No. 2, and the flagman on such derailed train had omitted to go out and warn McAuley, who was running west on track No. 2, against such obstruction, the defendant would not be responsible to McAuley for such neglect. Concededly such flagman would be a coemployee with McAuley. Concededly, in such case, the defendant would have fulfilled its full measure of responsibility if it provided competent and safe trainmen, promulgated proper rules and furnished all the appliances necessary to enable the flagman to go out and give the signal of danger in such a case required. Concededly, in such case, the defendant might delegate the duty of warning McAuley to the flagman of such train.

Why should a different rule prevail in the case before us? No reason is apparent and none is given, except the fictitious one that the company must be deemed to be itself in charge of the wrecking work, and hence must itself give notice that it is about to obstruct No. 2. I do not agree with plaintiff's counsel in this claim.

The rule that requires defendant to furnish a safe track for its

employees to run over goes to this extent only, that it shall not require them to work upon a track that it knows or, in the exercise of a reasonable inspection, ought to know is in an unsafe condition. If when it learned that track No. 4 was obstructed and unsafe, it at once withdrew its engines from running over it, it neglected no duty it owed them although it entirely omitted to repair the same. Unless McAuley was required to run upon track 4, he had no personal interest in having it repaired, and could make no complaint against defendant for not doing so. The defendant, therefore, in making such repairs was not performing any special duty it owed to McAuley or to any of its employees. It was at work in its own interest. The road cannot be operated without wrecks occurring, nor unless they are promptly cleared up when they do occur, and the wrecking train is, therefore, as much needed in the work of carrying on its transportation business as are its freight and passenger trains.

When the defendant sent out this wrecking train, therefore, it did so, not because it needed it to perform any duty it owed to its employees, but that it might have the benefit of track No. 4 to use in its transportation business; and the men who had charge of it bore the same relation towards defendant while engaged in such work that they would have borne had they been operating a freight or a passenger train. In each case they would have been at work for a similar purpose, to wit, assisting defendant in the daily operation of its road. Hence the flagman on the wrecking train no more represented the master, and was no less a coemployee with McAuley, than was the flagman on the derailed train above referred to. Nor is it possible to conceive how any of the employees on such wrecking train could be performing, in the defendant's place, any such duty as the law forbids the master to delegate. They were engaged in clearing track No. 4 so it could be used, made safe if you please. But there is no rule forbidding the defendant from delegating the performance of that work to its employees. Necessarily such work *must* be so performed, but that employment does not impose, nor assume to impose, upon them any authority to direct other employees when or where to work, or to require any service whatever from them. Hence they have no connection whatever with the duty that defendant is forbidden to delegate, and as to that

duty do not in any manner represent it. Clearly, for any negligent act committed by any one of such "wrecking crew" while so employed the defendant is responsible only under the rule of *respondet superior*. I conclude, therefore, that the plaintiff's claim that the flagman Wrafter was performing a work that the defendant could not delegate is not correct.

This case was in all its essentials similar to that of a derailment. The obstruction causing the injury was the occasional and temporary swinging of the boom onto track No. 2, an obstruction that was not known or anticipated by the defendant when McAuley left Schenectady and of which he could not at that time have been notified. The same precautions to notify him of such obstruction were taken by defendant as are required in the case of a derailed train, and I can discover no reason why the same rule as to defendant's responsibility should not apply to it.

The question as to who are, and who are not, coemployees arises in such an infinite number of instances that it is not possible to reconcile all the decisions upon that subject, and I do not attempt to cite any case which is in all its particulars a controlling one. I do not, however, find, and I am not cited to any that, in my judgment, is controlling against the conclusion which I have reached. On the contrary, the law upon such subject as settled in this State is entirely in harmony therewith.

Wrafter was a coemployee with McAuley in the business of operating defendant's road, and no negligence other than his has been proved against the defendant. For such negligence the defendant is not responsible, and, therefore, this action cannot be maintained.

The judgment and order should be reversed and a new trial granted, with costs to appellant to abide event.

All concurred.

Judgment and order reversed and new trial granted, costs to appellant to abide the event.

NATHAN W. HORNING, Respondent, v. HUDSON RIVER TELEPHONE COMPANY and FULTON COUNTY GAS AND ELECTRIC COMPANY, Appellants.

Third Department, January 8, 1906.

**Negligence — injury by live wire — failure to protect electric light wire — failure properly to support telephone wire — proximate cause.**

The plaintiff, a fireman, while going to a fire found a telephone wire breast high across the path through which the fire engine must pass. In attempting to remove it he was burned and injured by electricity. It was shown that said wire, owned by the defendant telephone company, was not strung on poles, but attached by brackets to wooden buildings with spans of from 519 feet to 188 feet. The use of the wire had been abandoned for some time. Because of a fire in one of the wooden buildings to which it was attached the wire had fallen on an unprotected electric light wire operated by the codefendant, and carrying a current of 2,500 volts. Said electric light wire was uninsulated, and not protected by guard wires. The telephone wire was strung 8 feet above said electric light wire. There was evidence that insulation or a guard wire over the light wire, if kept in good condition, would have prevented the transmission of the current to the telephone wire.

*Held*, that the negligence of both defendants was properly left to the jury and that a verdict for the plaintiff was warranted by the evidence;

That the question as to whether the defendants in the exercise of reasonable prudence could have anticipated that said building might burn and bring the wires into contact was for the jury;

That the failure of the defendants properly to protect the wires was the proximate cause of the injury, and not the burning of the building which caused the fall of the wire.

**APPEAL** by the defendants, the Hudson River Telephone Company and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Fulton on the 15th day of June, 1905, upon the verdict of a jury for \$11,000, the amount having been reduced by consent from \$14,000, and also from an order entered in said clerk's office on the 10th day of July, 1905, denying the defendants' motion for a new trial made upon the minutes, with notice of an intention to bring up for review upon such appeal an order entered in said clerk's office on the 15th day of June, 1905, granting the plaintiff an additional allowance of costs.

The defendant gas and electric company is a duly organized cor-

App. Div.]

Third Department, January, 1906.

poration, exercising its franchise to furnish light and power by electricity to the city of Johnstown, and it was lawfully operating in the streets of such city. It had extended its wires through West Montgomery street, and such line seems to have been in all respects well and thoroughly constructed and insulated from the ground at that locality. The defendant telephone company was also a corporation lawfully exercising its franchise to act as such through the streets of such city. Some six or seven years after such light company had erected its said lines through said street, such telephone company carried its wires from the west mill of one Stewart, and which was on the west side of such street, across said street to the east mill, so called, of said Stewart, on the easterly side of such street, and thence from such east mill to the Geisler mill, so called, and the only support for such wires were the wooden buildings to which they were attached.

On the night of July 6, 1903, the Geisler mill took fire and burned down. During the progress of the fire, the plaintiff, who was a member of the fire department of said city, on his way to such burning mill, passed through a lane on the premises of Stewart which was used in connection with such east mill, and found the telephone wire that had extended from Stewart's east mill to the Geisler mill lying across such lane and about breast high, and evidently an obstruction to any hose cart or fire engine that should attempt to pass through there. He, with Stewart, who was with him at the time, took hold of such wire and attempted to break it, and remove it from that position, and after continuing such effort for a short time, he received a shock which resulted in a very serious burning and injury. For the injuries so sustained he brought this action against these defendant companies, claiming that it was caused by their negligence. Such claim of negligence was based upon the proposition that the current which injured the plaintiff had been diverted from the electric company's wire by the telephone wire having fallen upon and come in contact with such wire and that such contact was caused by the negligent manner in which such wires were put up and maintained. The jury rendered a verdict for the plaintiff and against both defendants, and from the judgment entered thereon and from an order denying a motion for a new trial this appeal is taken. Further facts appear in the opinion.

*John A. Delehanty* and *James J. Farren*, for the appellant telephone company.

*Fred Linus Carroll*, for the appellant electric company.

*Andrew J. Nellis*, for the respondent.

PARKER, P. J. :

By the evidence in this case this situation was presented to the jury: The light company had constructed its poles and wires through West Montgomery street. It was lawfully authorized to use such street, and such construction was the usual and standard one. The span at the place where the contact complained of took place was upon good substantial poles, well insulated from the street, and was 168 feet in length. The telephone company thereafter erected its line in that part of the city and stretched a wire some 8 feet above the light company's wires, crossing Montgomery street and the Cayadutta creek adjacent thereto, and also over a bridge that crosses such creek. This locality is in the extreme suburbs of the city and where the buildings are some considerable distance apart. Such telephone wire, instead of being supported by poles, is attached to brackets which are fastened to the roofs of the wooden buildings some 30 feet from the ground. The west end of such telephone wire was attached to a bracket fastened to the roof of Stewart's west mill, so called. It then extended across the creek and street at a height of 8 feet above the upper wires of the electric lines, and was fastened to a bracket on Stewart's east mill, so called. It then proceeded in a northeasterly direction, across private property and some 30 feet above the earth, to the Geisler mill, making a span of some 519 feet. From thence it extended a distance of 260 feet to the Lefler building, and thence to other buildings and poles connecting with the telephone company's lines throughout the city. The span from the west mill to the east mill over the light company's wires was 232 feet. It may be assumed that the brackets were well and securely fastened to the buildings and that the telephone wire was tightly stretched such distance of 30 feet above the earth. No poles or supports other than the buildings mentioned were used, and the spans so created by that method of sustaining the wire were unusually long.

App. Div.]

Third Department, January, 1906.

When first put up this wire was used to furnish telephone service to the several mills in that locality, but for some year and a half before this accident such service had been withdrawn and the use of such wire abandoned, and it is apparent that for that period little attention had been paid to inspecting such wire.

The general construction of the light company's line in Montgomery street was a standard one. The claim of the plaintiff, however, is that, under the conditions that were presented by the construction and maintenance of the telephone wire in the manner above stated, and in view of the strength of the electric current which was taken through its upper wires for the purpose of lighting the streets, viz., 2,500 volts, an especial duty was put upon each company to provide other and better safeguards against a contact between their respective wires than were provided, and to prevent, by better insulation of their respective wires, a transmission of the electric current in the event that a contact did occur. Upon this claim the trial court charged the jury as follows: "The electric light company says that its plant was standard construction throughout, and that for the ordinary purpose of conveying electricity the plant was beyond criticism. And unless you find that there was an unusual and extraordinary situation at the bridge, you would find that the electric light company had in use a standard and up-to-date plant, and had taken the precaution usually taken where a telephone wire crosses an electric light wire." And it also further charged substantially to this effect: So far as the lighting company is concerned there is no serious question that this line at this bridge, if it had not been for this crossing, or if the crossing had been made in the usual way, without connection with the buildings, was beyond serious criticism. But the question is whether the electric light company, in the exercise of reasonable prudence, should have noticed the insulation on the respective wires; that the telephone wire was supported upon ordinary wooden buildings; that such buildings were liable to burn and the wires, therefore, to come in contact; that if contact did occur trouble would arise; and would a prudent man, under such circumstances, have continued the business of carrying electricity through the streets without doing anything to render it any more safe, and could anything be done to render it more safe?

Thus it is seen that the issue upon which the jury have passed is a narrow one. Telephone wires are constantly being taken over electric light wires, and under ordinary circumstances no precautions other than were taken here to prevent contact, viz., a distance of eight feet apart, are deemed necessary; but were the conditions in this case such that reasonable care and prudence required extra precautions? Would guard wires have tended to prevent contact, and should they have been added by the electric light company in this case? Could their respective wires have been so insulated at the place of this crossing as to have prevented a diversion of the current in case the telephone wire, *for any cause*, sagged or fell; and if so, was there such reason to apprehend a possible sag or fall that a prudent man using such a powerful and deadly current would have so insulated the wires? Such were substantially the questions left to the jury, and whether they were warranted by the evidence in reaching the conclusion which they have reached is the first question for us to examine.

Both companies earnestly contend that as to a better insulation of the wires it is plainly shown that there is no insulation either used or made that would be adequate to prevent the transmission of the current from the light wire, carrying the voltage that it did, to the telephone wire, if they came in contact; that, therefore, neither can be charged with negligence in not so insulating them. Undoubtedly all experts agreed that no such insulation was made or in general use; but, as I understand the evidence, one of the defendants' experts testified that a rubber insulation five-thirty-seconds of an inch thick would be adequate to prevent such transmission if sufficient care and attention was given to keep it in proper condition. I do not find any evidence to the effect that such an insulated wire for a distance of 168 feet could not be procured, or that it could not with reasonable effort be maintained in proper order.

As to the protection from contact by the use of a guard wire above and outside of those carrying the electric current, on the light company's poles, the defendants also urge that the proof shows that such wires are nowhere used for such protection, and that their use adds danger to the situation rather than prevents a contact. After diligently studying the evidence on this point, I do not con-



cur with their counsel that the evidence is conclusive to that effect. Undoubtedly the evidence of the defendants' expert is, that such guard wires are not used for such a purpose, and all substantially agree that under the conditions which this case presents as to the conditions and supports of the telephone wire, they still thought that the electric company's line at this point was well and properly built and up to standard, without their use. But some of such expert evidence agreed that such a guard, if "properly installed, inspected and maintained, \* \* \* would act as a source of safety." And the question is, whether in this particular case such a guard could not have been "properly installed, inspected and maintained" and thus have prevented the contact that worked this injury. I cannot find that it is *established* by the evidence that it could not, or that its use was either unsafe or impracticable. On the contrary, it seems to me that for the distance of 168 feet, which was the length of the span over which the telephone wire hung, such a guard could have been easily erected and maintained, and I am not prepared to hold that the jury erred in arriving at that conclusion.

The jury have evidently concluded that other practicable provisions against the two wires coming in contact and the diversion of the current from the one to the other, could have been taken by the defendants, and each of them; and under this evidence I am not disposed to disturb the finding of the jury on such questions.

Of course the fact that such precautions could have been taken and would probably have prevented the injury, does not render either defendant liable for this injury unless it was negligence on its part not to have taken it. Each defendant vigorously urges that unless the Geisler mill had burned, the telephone wire would not have fallen, and the method of protecting against contact of the wires and transmission of the current would have been entirely sufficient; and that it is beyond reason to require them to anticipate such burning, and to take unusual precautions in expectation thereof. In other words, they deny that there were any conditions that did or should have suggested a falling wire and extra precautions to prevent it. That, I think, was a question properly submitted to the jury. Of course the jury might properly charge the electric company with knowledge of the precise situation of the telephone wire as it was stretched and supported over and beyond its line. It was

its plain duty to know that condition, to consider how it affected its own line, and, if there was anything indicating danger, which a reasonably prudent man would take notice of, then such company should have noticed it and protected against it, so far as in the exercise of reasonable care and prudence it could have protected against it.

The plaintiff calls attention to the fact that each of the supports of this telephone wire from and including its west end to the Geisler mill, and for some distance east of it, was a wooden building, either one of which was much more liable to burn than a pole would be; that the first span from the easterly support of the span crossing the electric light wire, viz., Stewart's east mill, was 519 feet long, and the further end of that span was the Geisler mill. No support of any kind for that long distance was between those two mills. So that, if either of those two buildings burned, it was to be expected that *both* ends of such span would be loosened from their support. And, therefore, if either one of the several buildings burned, it was to be expected that the telephone line would be disturbed probably the whole length of it and thus threaten to loosen the telephone wire and cause it to sag or fall. These and sundry other arguments were presented to the jury as showing that reasonable prudence should have discovered that the result of a fire, although as far away as the Geisler mill, was an event which, if it did happen, would be likely to bring about a contact between the two wires, and very clearly, as they argued, if either building at the east or west end of the telephone span crossing Montgomery street was burned, contact would be sure to follow. The question as to whether each defendant should not in reasonable prudence have so far anticipated the burning of some one of such buildings as to require it to protect against the clear result likely to follow therefrom, was in my judgment one of fact for the jury.

We have, then, the decision of the jury to the effect that, under the circumstances thus presented to the two defendants, it was their duty to have taken other and further precautions against contact by their two wires, and that there were precautions which in the exercise of *reasonable* inspection and diligence they could have taken, and that their neglect to so take them was a *negligent* omission which caused the contact now complained of. Taking the whole

App. Div.]

Third Department, January, 1906.

evidence in this case, I am of the opinion that we should not disturb either of such conclusions.

It is further urged upon us by the defendants that, even though they were negligent in not better guarding against the contact of their wires and the diversion of the electric current from the one to the other, nevertheless such negligence was not the proximate cause of the plaintiff's injury, and that, therefore, he cannot recover in this action.

It is plain that, if by its fall, the telephone wire had not come in contact with the electric wire and thereby diverted its current, this injury to the plaintiff would not have occurred. It was the transmission of such current into the telephone wire that was the direct cause of plaintiff's injury; and if such transmission may be charged to the negligence of the defendants it is difficult to see why such negligence is not the direct cause of the injury. There is no intervening cause between such contact and the plaintiff's injury, and if such contact is due to the defendants' negligence then such negligence is the direct or proximate cause thereof. It seems to me that the negligence which the verdict of the jury has imposed upon the defendants is a negligence to which the act of contact and consequent transmission of the electric current was due. The precise and only negligence with which the defendants are charged is one that makes them responsible for that contact, and hence concede the negligence, and there is really no question of proximate cause in the case.

It is true that if the mill had not burned and the telephone wire been thereby torn down there could have been no injury, but that is because there would then have been no contact of wires. In this aspect the burning of the mill is a concurrent cause of the injury, but it is the remote and not the proximate cause. The defendants' omission to guard against the natural result of such remote cause is the negligent act complained of. It may be that the defendants did not neglect any duty they owed to the plaintiff in not anticipating and protecting against that remote cause. I concede that is a question not without doubt, but if the jury have correctly resolved that doubt, and, as I said above, under all the features of this case it should be left to them to determine, I have no doubt that the

defendants' omission to protect against contact of their wires was the proximate cause of this injury, and I do not attempt to analyze the numerous cases on that subject and compare them with the facts of this case. In *Laidlaw v. Sage* (158 N. Y. 99, 100) is quoted a definition from the *American Law Review* (Vol. 4, pp. 204, 205), which clearly illustrates and determines the question whether the burning of the mill, or the negligent omission to guard against contact of the wires, should be deemed the proximate cause of the plaintiff's injury.

It is manifest that the question as to preventing contact of its wires and consequent transmission of the electric current was as applicable to the telephone company as to the other one, and that the jury had the same warrant to charge negligence in that respect against it, if not more, and, hence, I have not examined the evidence as applying separately to each case. Upon the finding of the jury and the evidence in the case both are to be charged with a negligent omission in that respect.

I have examined the exceptions taken by the respective defendants upon the trial and do not find any that I think require a reversal of this judgment.

In my opinion the judgment and order must be affirmed, with costs.

Judgment and order unanimously affirmed, with costs; **KELLOGG, J.**, not sitting.

---

**BANKERS' SURETY COMPANY, Respondent, v. DAVID ROTHSCHILD and Others, Defendants, Impleaded with ISAAO FRANK, Appellant.**

First Department, February 9, 1906.

**Pleading—allegations of conspiracy in action in equity—allegations setting out evidence stricken out.**

Though in an action in equity for an accounting for moneys obtained by the defendants through a conspiracy of extraordinary character the rules of pleading governing an action at law should be relaxed and allegations which bear upon the fraudulent scheme of the conspirators are proper, allegations which merely set out evidence of such conspiracy are improper and should be stricken out.

**Specific allegations considered and stricken out.**

App. Div.]

First Department, February, 1906.

APPEAL by the defendant, Isaac Frank, from so much of an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 12th day of December, 1905, as denies the said defendant's motion to strike out certain allegations of the complaint as scandalous and irrelevant and to make the said complaint more definite and certain. The complaint alleges:

"1. That the plaintiff is a foreign corporation created and existing under the laws of the State of Ohio and duly authorized to transact business in the State of New York \* \* \*.

"2. \* \* \* That the said Louis Kessel and Charles Kessel for many years prior to 1903 were copartners trading as Louis Kessel and Brother. \* \* \*

"3. \* \* \* That at the times hereinafter mentioned the defendants David Rothschild and Louis Rothschild were copartners trading as D. & L. Rothschild.

"4. \* \* \* That in or about the said summer of 1903 said defendants David Rothschild, Louis Kessel, Charles Kessel and Isaac Frank became copartners under the name or style of Kessel & Co. for the purpose of carrying on for their joint benefit the business of loaning moneys; \* \* \*

"5. \* \* \* That the defendant Isaac Frank \* \* \* has been and now is a ticket scalper or broker having an office at No. 347 Broadway and has never been engaged in any other business and was not possessed of either money or substantial credit.

"6. \* \* \* That the said defendants Louis Kessel and Charles Kessel, trading as Louis Kessel & Bro., were at the time of their liquidation largely indebted and did not have means to liquidate their said business. \* \* \*

"7. \* \* \* That the capital or funds used in carrying on the business of Kessel & Co. was obtained by means of the various transactions hereinafter set forth.

"8. \* \* \* That some years prior to 1903 the defendant David Rothschild organized the Globe Security Company and conducted it in such a manner that it eventually went into the hands of a receiver, \* \* \* with very large liabilities. \* \* \* And that while said David Rothschild was thus engaged with said Globe Security Company the said defendant, Isaac Frank, became

associated with said David Rothschild and the Globe Security Company business, and shortly thereafter associated himself with said David Rothschild in the organization and incorporation of the Equitable National Bank, from which the said David Rothschild was subsequently compelled to retire by reason of his business reputation and practices, and thereafter and shortly before the year 1903 the said defendants David Rothschild and Isaac Frank with others organized the Federal Bank of New York, and the said David Rothschild became and was its president from the time of its organization continuously until sometime in the spring of 1904, which said Federal Bank was organized for the purpose of carrying on financial transactions improper and irregular for a State bank to carry on or be connected with, and by reason of which said bank became insolvent and is now in the hands of a receiver, and is only expected to pay a comparatively small dividend to its depositors.

"9. \* \* \* The defendants, David Rothschild, Louis Rothschild and Isaac Frank and others entered into a conspiracy to establish false credits at various banks and trust companies in connection with said Federal Bank in the names of D. Rothschild, \* \* \* United Marine Mfg. & Supply Co., \* \* \* and others, for the purpose of wrongfully obtaining money by the exchange or kiting of checks and the procuring of loans and discounts from said several banks and trust companies, for the joint benefit of said defendants.

"10. \* \* \* That the \* \* \* corporations thus used were each and all of them corporations having practically no assets, credit or standing.

"11. \* \* \* That as a part of said conspiracy and in pursuance thereof the said defendants David Rothschild and Isaac Frank acquired the control and became the owners of said corporations, \* \* \* for the purpose of using said corporations and each of them in establishing bank accounts and false credits. \* \* \*

"12. \* \* \* That said corporations were \* \* \* officered as a part of said general conspiracy, and in pursuance thereof and for the purpose of using said corporations in aid thereof.

"13. \* \* \* That said defendants maintained an office at No. 346 Broadway, \* \* \* in the names of and as the place of business of said corporations, \* \* \* under the personal management and direction of the said Frank \* \* \*; that no part of the

App. Div.]

First Department, February, 1906.

expense of maintaining said office was ever charged to or paid by said corporations or any of them, but such expense was paid annually by said Frank as such acting treasurer or financial agent of said defendants out of the funds obtained as a result of their said conspiracy.

"14. \* \* \* That \* \* \* the said defendants, \* \* \* trading as Kessel & Co., took over the business carried on by said Frank at 346 Broadway \* \* \*.

"15. \* \* \* That accounts were opened in said Federal Bank of which said David Rothschild was the president and organizer, in the names of all of said corporations and that the total deposits in such accounts in said bank in the names of David Rothschild and D. & L. Rothschild between the respective dates hereinafter set forth is\* as follows: (Setting them forth).

"16. \* \* \* That the discounts obtained by said corporations, said D. Rothschild and D. & L. Rothschild between the respective dates hereinafter set forth at said Federal Bank is\* as follows: (Setting them forth).

"17. \* \* \* That as a part of said conspiracy, and in pursuance thereof, the said Frank opened and kept the following bank accounts in which the total deposits between the respective dates hereinafter set forth were substantially as follows: (Setting them forth).

"18. \* \* \* That as a part of said conspiracy and in pursuance thereof the following loans and discounts between the respective dates hereinafter set forth were obtained by said Frank from said Banks and Trust Companies. (Setting them forth).

"19. \* \* \* That the Equitable National Bank failed and has been wound up, and plaintiff has no information as to the amount of deposits and discounts, made and obtained therein by the said Frank or the amount of deposits and discounts made and obtained by the Hygienic Fibre Company in the Federal Bank.

"20. \* \* \* That as a part of said conspiracy and in pursuance thereof, a bank account was opened in the Mercantile Trust Co. in the name of one Louis Hasse in which large sums of money were from time to time deposited. \* \* \*

---

\* Sic.

"21. \* \* \* That sometime in or about the fall of 1902 or the spring of 1903, the said defendants Louis Kessel and Charles Kessel associated themselves with the said David Rothschild and Isaac Frank in some or all of their financial transactions as hereinbefore and hereinafter set forth, and became parties thereto and participants (therein).

"22. \* \* \* That as a part of said general conspiracy \* \* \* said defendants by and with the assistance of one John W. Wooten, the then attorney for said David Rothschild and the Federal Bank, one Armitage Mathews, one of the then attorneys for the plaintiff herein, one Samuel I. Ferguson, also an attorney, and others, conspired to contest the will of one William Weisell,\* deceased, and to have the said David Rothschild appointed temporary administrator thereof \* \* \* for the purpose of wrongfully and illegally using the assets of said Weisell\* estate. \* \* \*

"23. \* \* \* That the said David Rothschild, John W. Wooten, Armitage Mathews and Samuel I. Ferguson have been indicted by the grand jury of New York County for said conspiracy and are now under said indictment. (This paragraph was stricken out by the court below.)

"24. That the said David Rothschild was appointed the temporary administrator of said Weisell\* estate \* \* \* and \* \* \* came into possession of the assets of said estate \* \* \* aggregating upwards of \$150,000.

"25. \* \* \* That as a part of said conspiracies \* \* \* the said Armitage Mathews, one of the then attorneys for the plaintiff as aforesaid, concealed from plaintiff the true state of affairs and \* \* \* induced the plaintiff to execute the bond of said David Rothschild as such temporary administrator in the sum of \$400,000 as surety thereon without joint control of the assets of said estate. \* \* \*

"26. \* \* \* That immediately after the qualification \* \* \* as such temporary administrator \* \* \* the said David Rothschild by and with the aid of his co-conspirators and agents or dummies, began to wrongfully and unlawfully use the assets of said Weisell\* estate and borrowed money thereon for the joint benefit of himself and those associated with him in said conspiracies.

---

\*Sic.



App. Div.]

First Department, February, 1906.

"27. \* \* \* That as a part of said conspiracies and in pursuance thereof the said David Rothschild \* \* \* borrowed the following moneys from the following parties upon assets belonging to said Weissel\* estate which were in the possession of said Rothschild as such temporary administrator thereof, and under the following circumstances: \* \* \*

"28. \* \* \* That all of said bonds were of the par value of \$1,000, and of the market value of considerable more."

29. Alleges the alleged division of the proceeds of the said loans.

"30. \* \* \* That said various notes \* \* \* as they matured were renewed and the interest thereon to date was paid, so that the said Title Guarantee & Trust Company eventually held a note of said Hasse for \$32,500, the payment of which was secured by 42 bonds, the property of said Weissel\* estate, and the Mercantile Trust Company eventually held a note of said Hasse for \$39,000, the payment of which was secured by 46 bonds, the property of said Weissel\* estate.

"31. \* \* \* That the said David Rothschild has been indicted and convicted of a felony and \* \* \* sentenced to serve a term in States Prison for upwards of nine years, and pursuant to said sentence is now incarcerated in the State Prison at Ossining, New York. (This paragraph was stricken out by the court below.)

"32. \* \* \* That \* \* \* said Frank acted as the treasurer or financial agent and general manager for the said defendants in their said conspiracies and became a party thereto under an agreement that he was to receive a portion of the moneys made out of said transactions.

"33. \* \* \* That a decree was made and entered in the fall of 1903 admitting said will to probate, and an appeal from said decree was thereupon taken pursuant to said general conspiracy and as a part thereof, and the undertaking given upon said appeal was executed by the said defendant Charles Kessel as surety thereon at the instigation of the defendant Louis Kessel.

"34. \* \* \* That in said contest \* \* \* a motion was made by the executors named in said will for an order of the Surrogate's Court permitting them to exercise their functions as executors under the said will, and compelling the said temporary admin-

\* Sic.

istrator to turn over to them the assets of said estate. \* \* \* That said motion was defeated and denied, and the assets of said estate were allowed to remain in the hands of said temporary administrator. \* \* \*

"35. \* \* \* That during the fall of 1903, when the plaintiff through its then attorneys was demanding joint control of the assets of said Weissel\* estate or that it be discharged from all liability on the temporary administrator's bond, the said defendant Louis Kessel was actively engaged \* \* \*, in endeavoring to procure another surety company to go upon the bond of said temporary administrator in the place and stead of the plaintiff herein, and actually did procure another surety company so to do, but upon terms which the said defendant David Rothschild would not accept.

"36. \* \* \* That in various other ways the said defendants Louis and Charles Kessel, aided, abetted and assisted in the contest over the probate of the said Weissel\* will in the prolongation of said temporary administratorship and in the retention of the possession of the assets of said Weissel\* estate by said temporary administrator.

"37. That \* \* \* the plaintiff made application to the Surrogate's Court, New York County, \* \* \* to be discharged from all liability upon said bond of said David Rothschild as such temporary administrator and such proceedings were thereafter \* \* \* had that pursuant to the order of said court the plaintiff filed the account of the said David Rothschild as such temporary administrator \* \* \*; that objections to said account were filed by the executors of said estate and certain legatees, which \* \* \* were referred, and said reference is now pending, \* \* \* as a result of which and pursuant to two orders of said Surrogate's Court, the plaintiff took up all the outstanding loans which had been obtained upon the security of the assets of said Weissel\* estate and returned all of said bonds to the duly qualified executors thereof; and subsequently thereto upon its petition the said plaintiff by an order of the Supreme Court, New York County, has been subrogated to all the legal and equitable rights and remedies which said Weissel\* estate, the executors and legatees thereof, may have against

App. Div.]

First Department, February, 1906.

the said defendants and others without regard to whether said rights and remedies were immediately available or not.

"38. \* \* \* That the said Isaac Frank \* \* \* kept a ledger account between himself and the said David Rothschild and Louis Rothschild \* \* \* , and likewise \* \* \* with \* \* \* Louis Kessel and Charles Kessel \* \* \* , and also with the said firm of Kessel & Co. \* \* \* which \* \* \* said Frank has testified \* \* \* he lost \* \* \* .

"39. \* \* \* That said David Rothschild kept a ledger account of transactions with said Frank in a small book which he designated as his private ledger, \* \* \* which shows that said Frank had received from the said Rothschild in excess of what the said Rothschild had received from said Frank, the following amounts: (Setting them forth).

"40. \* \* \* That \* \* \* said Frank by and under the instructions of the said Rothschild delivered to \* \* \* Louis Kessel & Bro. various sums of money aggregating \$47,000 and between said dates the said Frank credited said Louis Kessel & Bro. with \$17,000, \* \* \* .

"41. \* \* \* That \* \* \* the said Isaac Frank \* \* \* delivered to the said firm of Kessel & Co. numerous and large sums of money \* \* \* and \* \* \* credited the said Kessel & Co. with the return of said monies.

"42. \* \* \* That \* \* \* the said Frank and the said Louis Kessel & Bro. and Kessel & Co. fixed up between them \* \* \* a statement of account, whereupon they agreed upon a balance in favor of said Frank, \* \* \* which said account was not taken from the ledger of the said Frank which had been lost as aforesaid, but was made up from an alleged pass-book and from entries on check stubs of checks drawn and monies deposited in the possession of the said Frank, \* \* \* .

"43. \* \* \* That said Frank kept a private book purporting to be a record of the monies delivered by him to the said Kessel & Bro. and the said Kessel & Co. \* \* \* ; that all monies delivered to said Kessel & Co., with one exception, were either delivered in currency or in the checks of third parties, and that all payments made by Kessel & Co., \* \* \* were made in currency or in checks to or by third parties under an agreement between the defendants

for the purpose of concealing from the various banks in which the defendants were carrying their accounts, the transactions which they were having, and that at no time did said Frank have any note of Louis Kessel & Bro. or Kessel & Co. for said monies or any part thereof or any security for the payment thereof.

"44. \* \* \* That the said David Rothschild, as such temporary administrator of said Weissel\* estate, deposited in the Bankers' Trust Co., pursuant to the order of the Surrogate's Court, monies belonging to said estate aggregating about \$6,000, and without the order of the Surrogate's Court wrongfully withdrew from said account most of said monies and used them for the joint benefit of himself and his associates in the transactions hereinbefore set forth.

"45. \* \* \* That each and all of the defendants were parties to said conspiracies and to said transactions and had knowledge thereof; and the said David Rothschild by his wrongful use of the assets of said Weissel\* estate \* \* \* and the other defendants by intermeddling with him as aforesaid \* \* \* became and were trustees *de son tort* and liable to the estate of the said William Weissel,\* deceased, \* \* \* and the plaintiff by its subrogation \* \* \* is entitled to all the legal and equitable rights and remedies of said estate against said defendants, \* \* \*.

"Wherefore, the plaintiff demands judgment that the defendants and each of them account to the plaintiff for all moneys procured or obtained by them jointly and severally upon assets belonging to said Weissel\* estate \* \* \*"

*Carlisle J. Gleason*, for the appellant.

*Henry White*, for the respondent.

INGRAHAM, J. :

The learned judge at Special Term recognizing the extraordinary character of this action came to the conclusion that while he would be inclined in an action at law to apply the strict rules of pleading in an equity case of the extraordinary character of the case here presented, in view of the inherent difficulties necessarily involved in the presentation of the case, he deemed it a better and safer practice to remit the consideration of the questions presented upon

\* *Sic.*

App. Div.]

First Department, February, 1906.

the motion then before him to the deliberate action of the trial justice, before whom all the facts would be unfolded. I am inclined to think that he was right in so far as this applies to the allegations of the complaint which relate to the relations between the various defendants and which bore upon the scheme adopted by them resulting in the wrongs for which the plaintiff seeks to hold these defendants liable; but giving the plaintiff the full benefit of this conclusion, there are certain allegations of this complaint that can have no possible bearing upon the combination between these defendants or, if they have any relation at all, it would be an allegation of evidence to prove the general allegations of a conspiracy or combination between the defendants. Thus, the 8th paragraph of the complaint, alleging the organization of The Globe Security Company and the Equitable National Bank, seems to be of no possible relevancy. The 12th paragraph seems to be also irrelevant. At most the facts alleged might be proved as tending to establish the relations that existed between Rothschild and the appellant Frank, but are entirely out of place in a complaint. The same applies to paragraphs 12, 13, 16, 17, 18, 19 and 20. Paragraph 38 is also irrelevant. Paragraphs 39, 42 and 43, while irregular in form, contain some allegations of fact which may be relevant. I think it is improper to allege in a pleading the fact that Rothschild kept a ledger account of transactions with Frank in a small book which he designated as his private ledger, and what Frank did as a witness before a referee in another action and his testimony as to these books. While it is possible that some of these facts might be competent evidence upon the trial, they are improper in a pleading.

My conclusion is that the order appealed from should be reversed, with ten dollars costs and disbursements of this appeal, and the motion granted to the extent of striking out paragraphs 8, 12, 13, 15, 16, 17, 18, 19, 20, 38, 39, 42 and 43, with ten dollars costs, the plaintiff to have leave to serve an amended complaint.

O'BRIEN, P. J., McLAUGHLIN, LAUGHLIN and CLARKE, JJ. concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted to the extent stated in opinion, with ten dollars costs, with leave to plaintiff to serve amended complaint.

**OWEGO GAS LIGHT COMPANY, Appellant, v. WILLIAM D. BOYER,**  
**Respondent.**

Third Department, January 8, 1906.

**Corporate bonds—when president of corporation has sufficiently accounted for bonds received for sale—delivery of bonds to other officer for sale.**

When a corporation by resolution authorizes an issue of bonds to be sold for the benefit of the corporation, and does not specify which officers are to sell them, the president of such corporation who has received the bonds for sale and has turned over some of them to the vice-president to sell is not accountable to the corporation for the bonds so turned over, in the absence of proof of negligence or collusion against the interests of the corporation in so doing.

Such president has sufficiently accounted for said bonds by showing that he turned them over to the vice-president for sale.

APPEAL by the plaintiff, the Owego Gas Light Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Tioga on the 15th day of March, 1905, upon the decision of the court rendered after a trial at the Tioga Special Term.

*George S. Sheppard*, for the appellant.

*H. Austin Clark*, for the respondent.

**KELLOGG, J. :**

The defendant was the president of the plaintiff's corporation, and by resolution of its board of directors duly passed, reciting that it was indebted to various persons aggregating about \$14,000, and that it desired to pay such indebtedness and to increase and improve its plant and extend its business, and for the purpose of raising funds for those purposes, it was resolved that the corporation issue and sell its bonds, aggregating \$50,000, to be secured by mortgage upon its plant, and the president and treasurer were empowered and directed to execute the same and to affix the corporate seal thereto. And it was also resolved that the balance of the stock unissued, viz., \$12,700, be issued and disposed of for the benefit of the corporation. The certificate of stock and the bonds were duly executed by the proper officers. The stock certificate was made out

App. Div.]

Third Department, January, 1906.

in the name of the treasurer to be held, and it does not appear that it ever has been issued, sold or transferred. It is now in the plaintiff's hands canceled, and there is nothing to show that any other certificate was ever issued in place of it. The defendant never had it, or any benefit from it.

After the bonds were duly executed the treasurer sent them to the defendant who resided at Scranton, Penn., and he sold \$25,000 par value of them at a discount, and accounted for the proceeds thereof, except \$2,000 which he reserved for his services with reference thereto, which sum is charged against him by the judgment appealed from, and no appeal has been taken from the judgment in that respect. The other \$25,000 of bonds he turned over to the vice-president of said company to be sold for the company, such vice-president being also the active superintendent of construction and repairs, having in charge the work of increasing and improving the plant of the company. The vice-president delivered \$3,000 of the bonds to the treasurer to be sold by him, and sold the balance of the bonds and turned over \$6,850 of the proceeds to the treasurer, and he expended other sums upon the property, the amount and details of which do not appear. The appellant complains of the judgment for the reason that it did not charge upon the defendant the duty of accounting for the proceeds of the bonds sold by the vice-president and charge him with the same. It does not appear what duties the by-laws of the company charged upon the various officers. The treasurer was the financial officer, and undoubtedly the vice-president was charged with the duty of assisting the president and performing any duties devolved upon the president in his absence. The resolution under which the bonds were issued directed their issue and sale and that the president and treasurer execute them. While it does not state who is to sell them, it is evident that some of the officers must perform that duty. Clearly neither the stockholders nor the board of directors were expected to make a sale of the bonds; it must be done by some one, and it is not apparent that this duty fell more directly upon any one than upon the president and by his direction the vice-president, especially after the financial officer had turned the bonds over to the president for sale. It was not improper or a breach of trust for the treasurer to turn the bonds over to the president for

sale, and the president having received the bonds out of the State, and being out of the State and unable as he felt to dispose of all of them advantageously, violated no duty in requiring the vice-president to perform the act of selling some of the bonds. There is no charge that it was a negligent or improper act to turn them over to the vice-president, or that the vice-president has made any improper use of them, or that the company has not in fact had the benefit of them, so there is no claim that the bonds were negligently and collusively turned over to the vice-president against the real interests of the company; assuming, as the evidence shows, that the president acted in good faith in turning the bonds over to the vice-president for sale, he being the party superintending and carrying on the improvements and repairs for which the bonds were authorized, the defendant has sufficiently accounted for the bonds and is not called upon further to account for the proceeds received by the vice-president. The judgment is affirmed, with costs.

Judgment unanimously affirmed, with costs.

---

CARL C. BERTHELSON, Appellant, v. JOHN C. GABLER, Respondent.

Second Department, January 26, 1906.

**Negligence — injury by fall of scaffold — Employers' Liability Act — liability of master for servant exercising superintendence — continuing duty to keep structure safe — freedom from contributory negligence.**

When the evidence shows that the scaffold which fell and injured the plaintiff was originally constructed by the plaintiff and his fellow-servants in a safe manner, but became unsafe by reason of the removal of a supporting pier under the direction of a person in the service of the defendant exercising superintendence within the meaning of the Employers' Liability Act, a recovery by the plaintiff is not barred on the theory that the negligence is that of a fellow-servant.

Though the scaffold was originally safe, it was still the duty of the defendant to maintain it in such condition.

The plaintiff is not guilty of negligence as a matter of law, although he heard an order given to take down the supporting pier, as he is entitled to assume that defendant will discharge his continuing duty to keep the scaffold safe, unless the omission to do so were obvious and actually known to the plaintiff.



App. Div.]

Second Department, January, 1906.

APPEAL by the plaintiff, Carl C. Berthelson, from an order of the Supreme Court, made at the Kings County Trial Term and entered in the office of the clerk of the county of Kings on the 29th day of November, 1904, setting aside a verdict in favor of the plaintiff as contrary to law and against the weight of evidence and granting a new trial.

*Bruce R. Duncan*, for the appellant.

*Jacob Gordon*, for the respondent.

PER CURIAM :

The plaintiff was injured by the fall of a scaffold upon which he was at work for the defendant. The scaffold was actually constructed by the plaintiff and his fellow-workmen, all of whom were in the defendant's service. The evidence leaves no doubt that, as originally constructed, the scaffold was safe for the use of the persons employed upon it. The structure was rendered unsafe by the subsequent removal, in part or in whole, of a brick pier forming a portion of the building under repair. This brick pier gave some support to a joist which formed a part of the scaffold; and the removal of the pier, according to the testimony adduced in behalf of the plaintiff and the fair inferences to be drawn therefrom, so weakened the scaffold as to cause it to fall.

The pier was removed at the instance and by the direction of a person in the service of the employer intrusted with and exercising superintendence over the work within the meaning of subdivision 2 of section 1 of the Employers' Liability Act (Laws of 1902, chap. 600). Hence the plaintiff is not barred from maintaining the action on the ground that his injuries were the result of negligence on the part of a fellow-servant.

Because of the fact that the scaffold was actually put up by the plaintiff and his fellow-carpenters, the learned trial judge was of the opinion that it was not furnished by the defendant within the meaning of the Labor Law (Laws of 1897, chap. 415, § 18). In reaching this conclusion we think he adopted too narrow a view of the testimony given by the defendant's superintendent, which indicates that he gave directions as to the manner of its construction. The proof, as we look at it, tends to show that the defendant, in the first instance,

discharged his absolute duty to furnish a safe scaffold. The obligation, however, was a continuing duty, and the principal question in the case was whether that duty was fulfilled during the entire period in which the scaffold was used. (*Walters v. Fuller Co.*, 74 App. Div. 388, 393.) This was a question of fact which the learned trial justice properly left to the jury. There was evidence sufficient to warrant their finding of negligence in this respect in the proof that the superintendent was present at the work after the scaffold was completed, and that he personally directed the removal of the old front of the building, in doing which the center pier, which partly supported the scaffold, had to be removed.

The question of contributory negligence was also properly submitted to the jury. (See Employers' Liability Act [Laws of 1902, chap. 600], § 3.) It did not follow that the plaintiff was guilty of contributory negligence as matter of law, because he had heard an order given by a foreman to a fellow-workman to take down the pier. According to his testimony he was away from the work for several hours and did not notice that the pier had been removed when he returned to the scaffold, or until after he was hurt. Even if he had observed that the pier had been taken down, he was entitled to assume that the defendant had discharged his continuing duty to keep the scaffold safe, unless the defendant's omission to do so was obvious and patent to the senses or actually known to him.

In view of the provisions of the Labor Law and of the Employers' Liability Act, we are of opinion that the plaintiff made out a case entitling him to go to the jury. We are unable to agree with the learned trial justice that the verdict was against the weight of evidence, nor can we find any legal error which will sustain the order for a new trial. That order should, therefore, be reversed, and the verdict should be reinstated.

Present, — JENKS, HOOKER, RICH and MILLER, JJ.

Order setting aside verdict and granting new trial reversed, with costs, and verdict reinstated, with costs.

EDWIN WATSON KNICKERBOCKER, Appellant, v. GROTON BRIDGE AND  
MANUFACTURING COMPANY, Respondent.

First Department, February 9, 1906.

**Corporation — action by stockholder to dissolve corporation and set aside prior voluntary dissolution — complaint — failure to state cause of action — when directors not necessary parties defendant.**

The complaint in an action by a stockholder under section 1785 of the Code of Civil Procedure to procure the dissolution of a corporation alleged that the ordinary and lawful business of the corporation had been suspended for at least a year and the submission of a written statement of facts to the Attorney-General and his failure to institute an action within sixty days, and further alleged in substance that in a prior proceeding by the corporation in voluntary dissolution, pursuant to section 57 of the Stock Corporation Law, a certificate had been issued by the Secretary of State to the effect that the corporation had complied with said section in order to be dissolved in pursuance thereof, but that said proceeding was taken without notice to the plaintiff or to minority stockholders and for the purpose of defrauding the plaintiff and minority stockholders, etc., in pursuance of a conspiracy set forth in the complaint. The relief demanded was that the voluntary dissolution be set aside. *Held*, that as said complaint did not allege that the notice to stockholders required by the statute (Stock Corporation Law, § 57) had not been published or that no notice had been served upon or mailed to the stockholders, the complaint failed to state a cause of action;

That the allegations as to the fraudulent purpose of the voluntary dissolution were not allegations of fact which justified a judgment declaring the proceedings void, but were mere allegations of motive which were immaterial.

*It seems*, that the directors are not necessary parties defendant in such action when no personal judgment is asked against them.

APPEAL by the plaintiff, Edwin Watson Knickerbocker, from an interlocutory judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 27th day of October, 1905, upon the decision of the court, rendered after a trial at the New York Special Term, sustaining the defendant's demurrer to the complaint.

*W. Gerald Philippeau*, for the appellant.

*Paul Eugene Jones*, for the respondent.

INGRAHAM, J. :

The demurrer to this complaint was upon the ground that there was a defect of parties defendant, and that the complaint did not state facts sufficient to constitute a cause of action.

The action was brought by a stockholder to dissolve a domestic corporation. The plaintiff alleges that he is the owner of fifty shares of the capital stock of the corporation, which consisted of twelve hundred shares of the par value of \$100 each; that the defendant has suspended its ordinary and lawful business for more than one year; that in January, 1900, the plaintiff received a report from the defendant of the condition of its business on December 31, 1899, showing a surplus, inclusive of its capital stock, amounting to over \$600,000; that thereafter and in May, 1900, the defendant had transferred and set over the greater part of its assets to a corporation known as the American Bridge Company, in consideration of the issuance and transfer to one Conger, as president of the defendant, by the said American Bridge Company, of a number of shares of the preferred and common stock of the said American Bridge Company of the par value of \$100 each, and at the same time sold and transferred to the American Bridge Company certain of its uncompleted contracts for a sum exceeding \$165,000; that thereafter and in or about June, 1901, the directors of the said defendant corporation sold all its remaining assets to Conger at auction for the sum of \$36,000; that in or about July, 1901, the directors of the defendant caused proceedings to be instituted pursuant to the provisions of section 57 of the Stock Corporation Law for the voluntary dissolution of the defendant, which proceedings resulted in the issuance of a certificate by the Secretary of State of the State of New York, to the effect that it appeared from his records that the defendant had, in all respects, complied with section 57 of the Stock Corporation Law in order to be dissolved in pursuance of the provisions thereof; that these proceedings were instituted without notice to the plaintiff, or to the minority stockholders of the defendant corporation, and were so instituted for the purpose of defrauding the plaintiff and the minority stockholders, and in furtherance of a combination and conspiracy on the part of the then directors of the defendant to deprive the plaintiff and the minority stockholders of their rights and interests in and to the assets of the defendant, and

for the sole purpose, and as a convenient method, to convert the property of the defendant corporation to their own use and benefit; that although these so-called dissolution proceedings were had and completed, in so far as the same could be completed in the absence of notice to all of the stockholders of the defendant, in July, 1901, neither the directors of the defendant nor any or either of them had ever accounted for the property of the defendant committed to their charge, as trustees of the stockholders; that the plaintiff duly demanded such an accounting of the defendant and of its directors but that this demand had not been complied with; that prior to the commencement of this action, the plaintiff submitted to the Attorney-General a verified statement of facts showing the grounds for an action under the provisions of subdivision 3 of section 1785 of the Code of Civil Procedure; that more than sixty days had elapsed since the said submission to the Attorney-General and that he had omitted to commence the action specified in said section of the Code; that thereupon the plaintiff, prior to the commencement of this action, obtained leave of the court to bring this action. The judgment demanded is that the corporation be dissolved; that these voluntary proceedings be vacated and set aside as irregular and void, and in fraud of the minority stockholders of the defendant; that the defendant and its directors and officers be enjoined and restrained from exercising any of its corporate rights, privileges and franchises, and from collecting or receiving any debts or demands or other assets of the defendant, and from paying out, or in any way transferring or delivering to any person any of the moneys, property or effects of the defendant until the further order of the court, and that a receiver of the defendant be appointed pursuant to the provisions of section 1788 of the Code of Civil Procedure.

The plaintiff bases this action upon section 1785 of the Code of Civil Procedure, which provides that an action to procure a judgment dissolving a corporation created by or under the laws of this State may be maintained: "3. Where it has suspended its ordinary and lawful business for at least one year." Section 1786 provides that an action specified in section 1785 of the Code may be maintained by the Attorney-General in the name and in behalf of the People, and that whenever a creditor or stockholder of any corporation submits to the Attorney-General a written statement of

facts, verified by oath, showing grounds for an action under the provisions of section 1785 of the Code, and the Attorney-General omits, for sixty days after this submission, to commence such an action, then and not otherwise such creditor or stockholder may apply to the proper court for leave to commence such an action, and on obtaining leave may maintain the same accordingly. The complaint having alleged the fact that the ordinary and lawful business of the corporation had been suspended for at least a year and the submission of a written verified statement of the facts to the Attorney-General, and his failure to institute an action within sixty days, and leave of court to commence the action prior to the commencement thereof, the plaintiff was entitled to maintain this action unless other facts alleged were a bar to the action, and it was because of the allegation of these facts that the learned court at Special Term held that the plaintiff could not maintain the action.

The plaintiff takes the point that as by these allegations he has merely anticipated a defense, the proper remedy of the defendant was a motion to strike out these allegations. If, however, on the facts pleaded the plaintiff could not maintain the action, the complaint is demurrable. The facts alleged which the court below considered a bar were that in July, 1901, the directors of the defendant caused proceedings to be instituted pursuant to the provisions of section 57 of the Stock Corporation Law for the voluntary dissolution of the defendant, resulting in the issuance of a certificate by the Secretary of State of the State of New York to the effect that it appeared from his records that the defendant had in all respects complied with said section in order to be dissolved in pursuance of the provisions thereof. If the legal result of a proceeding under section 57 of the Stock Corporation Law was to dissolve the corporation, then this action could not be maintained, as by operation of law the corporation had become dissolved.

Section 57 of the Stock Corporation Law (Laws of 1892, chap. 688, added by Laws of 1896, chap. 932, and am. by Laws of 1900, chap. 760) provides: "Any stock corporation, except a moneyed or a railroad corporation, may be dissolved before the expiration of the time limited in its certificate of incorporation or in its charter as follows: The board of directors of any such corporation may at a meeting called for that purpose upon, at least, three days' notice to

each director, by a vote of a majority of the whole board, adopt a resolution that it is in their opinion advisable to dissolve such corporation forthwith, and thereupon shall call a meeting of the stockholders for the purpose of voting upon a proposition that such corporation be forthwith dissolved. Such meeting of the stockholders shall be held not less than thirty nor more than sixty days after the adoption of such resolution, and the notice of the time and place of such meeting so called by the directors shall be published in one or more newspapers published and circulating in the county wherein such corporation has its principal office, at least once a week for three weeks successively next preceding the time appointed for holding such meeting, and on or before the day of the first publication of such notice a copy thereof shall be served personally on each stockholder, or mailed to him at his last known post-office address. \* \* \* If at any such meeting the holders of two-thirds in amount of the stock of the corporation then outstanding shall, in person or by attorney, consent that such dissolution shall take place, and signify such consent in writing, then such corporation shall file such consent, attested by its secretary or treasurer, and its president or vice-president, \* \* \* in the office of the Secretary of State. The Secretary of State shall thereupon issue to such corporation, in duplicate, a certificate of the filing of such papers, and that it appears therefrom that such corporation has complied with this section in order to be dissolved, and one of such duplicate certificates shall be filed by such corporation in the office of the clerk of the county in which such corporation has its principal office, and thereupon such corporation shall be dissolved and shall cease to carry on business, except for the purpose of adjusting and winding up its business." The statute then authorizes the board of directors to proceed to liquidate the affairs of the company and to wind up its business.

If by a compliance with the provisions of this statute and the issuance of the certificate of the Secretary of State, as therein provided, the corporation becomes dissolved, thereafter no action under sections 1785 and 1786 of the Code could be maintained for that purpose. The complaint alleges that a proceeding was instituted under this section, and that such proceeding resulted "in the issuance of a certificate by the Secretary of State of the State of New York, to the effect that it appeared from his records that the defendant had in all respects

complied with section 57 of the Stock Corporation Law, in order to be dissolved in pursuance of the provisions thereof." That allegation, thus standing alone, was an allegation of a compliance by this corporation with the provisions of this section, and that the corporation was dissolved. The plaintiff, however, asks, as a part of the relief to which he claims to be entitled, that this proceeding which resulted in a dissolution of the corporation be vacated and set aside as irregular and void and in fraud of the minority stockholders of this defendant. To sustain this demand for relief, which must be granted before the plaintiff could maintain an action to dissolve the corporation, he alleged that these voluntary dissolution proceedings were instituted without any notice to the plaintiff or to the minority stockholders of the defendant; that these dissolution proceedings were instituted for the purpose of defrauding the plaintiff and the minority stockholders and in furtherance of a combination and conspiracy on the part of the then directors of the defendant to deprive the plaintiff and the minority stockholders of their rights and interests in and to the assets of the defendant, and for the sole purpose and as a convenient method to convert the property of the defendant corporation to their own use and benefit; and, further, that the directors of the corporation have never accounted for the assets of the corporation received by them, although such an accounting has been demanded. But a failure of the directors to account has no relation to this cause of action, as the plaintiff has his remedy in a proper action to compel such an accounting. The right of the plaintiff to ask that this dissolution proceeding be declared void depends upon the allegations of the 13th paragraph of the complaint. The facts there alleged are that the so-called voluntary dissolution proceeding was instituted without any notice to the plaintiff. It is not alleged that the notice required to be published by the statute was not published, or that no notice was served upon or mailed to the stockholders, as therein provided, but simply that the proceeding was instituted without notice to the plaintiff or to the minority stockholders. This allegation is necessarily a conclusion, not based upon any fact alleged to show that the provision of the statute has not been complied with. The clear intent was to make the certificate of the Secretary of State evidence of the due performance of the provisions of the statute, and I do not think



that this allegation is sufficient to base a claim for a revocation of this proceeding based upon a failure of the directors to publish and serve or mail the notice required by section 57 of the Stock Corporation Law. The further allegation as to the purpose for which these proceedings were instituted is not the allegation of a fact which justifies a judgment declaring them void. The mere motive of the directors in instituting proceedings is entirely immaterial. If the proceeding was conducted according to the statute; if the steps required by the statute to dissolve the corporation were taken, and the corporation thereby became dissolved, certainly the proceedings cannot be vacated because the plaintiff alleges that the motives of the directors were fraudulent.

I think, therefore, that the complaint does not state facts sufficient to constitute a cause of action.

The learned trial court also held that there was a defect of parties defendant, in that the officers and directors whose conduct was complained of were not made defendants. If the action was solely to dissolve the corporation, I do not think the officers and directors are proper parties. If a judgment was asked against them, of course they would be. Upon the ground, however, that the complaint fails to state facts sufficient to constitute a cause of action, the demurrer was properly sustained.

It follows that the judgment appealed from must be affirmed, with costs to the respondents, with leave to the plaintiff to serve an amended complaint within twenty days upon payment of the costs in this court and in the court below.

O'BRIEN, P. J., LAUGHLIN, CLARKE and HOUGHTON, JJ., concurred.

Judgment affirmed, with costs to respondents, with leave to plaintiff to amend on payment of costs in this court and in the court below.

In the Matter of the Appraisal under the Act in Relation to Taxable Transfers of Property of the Property of EMILY M. LORD, Deceased.

FRANKLIN B. LORD and WILLIAM B. LORD, Appellants; ERASTUS C. KNIGHT, as Comptroller of the State of New York, Respondent.

First Department, February 9, 1906.

**Tax Law—inheritance tax on property of non-resident—when trust funds passing under power of appointment taxable—when legacy not taxable.**

When a non-resident testatrix makes a bequest of property within this State which came to her as the corpus of a trust estate of which her husband was beneficiary, and over which he had a power of disposal, the same is subject to a transfer tax under the Laws of 1887, chapter 713, and the Laws of 1891, chapter 215, then in force, because on the exercise of the power of disposal the wife's title relates back to the instrument creating the trust, and her title is absolute on the death of the beneficiary.

But property within this State which came to such non-resident testatrix as residuary legatee of her non-resident husband, whose will was not admitted to probate until after the death of said testatrix, is not property within this State under the meaning of the act aforesaid, and hence is not subject to taxation, because the right of the testatrix as such residuary legatee was not a right to any particular property, but a right only to an undetermined balance due after payment of debts and expenses of administration.

APPEAL by Franklin B. Lord and William B. Lord from so much of an order of the Surrogate's Court of the county of New York, entered in said Surrogate's Court on the 26th day of June, 1905, as affirms an order theretofore entered in the above-entitled proceeding assessing and determining a transfer tax in respect to the property passing under the last will and testament of Emily M. Lord, deceased.

*Lucius H. Beers*, for the appellants.

*Emmet R. Olcott*, for the respondent.

INGRAHAM, J.:

The question in this case arises under somewhat peculiar conditions. One Edward C. Lord, a resident of the State of New

App. Div.]

First Department, February, 1906.

Jersey, died on the 8th day of January, 1892, leaving a last will and testament which was duly admitted to probate by the proper probate court of that State. By his will he gave all of his estate real and personal to his wife, Emily M. Lord, and he also exercised the power of appointment of certain property held by trustees in favor of his wife, and appointed his wife, Emily M. Lord, also a resident of the State of New Jersey, and his nephew, Franklin B. Lord, a resident of the State of New York, executrix and executor. Before this will was admitted to probate his wife, Emily M. Lord, died a resident of the State of New Jersey, leaving a last will and testament appointing George de Forest Lord and Franklin B. Lord executors. Edward C. Lord owned no real property within this State, and as the statute at that time provided no means of assessing and collecting a tax upon property of a non-resident not owning real estate within this State the transfer of his property was not taxable. (*Matter of Embury*, 19 App. Div. 214; *affd.* on opinion below, 154 N. Y. 746.)

After the will of Edward C. Lord had been admitted to probate in the State of New Jersey, the surviving executor took the property of the decedent that was within this State to the State of New Jersey. The estate of Emily M. Lord was then administered in the State of New Jersey and subsequently distributed. Thereafter in September, 1901, the Comptroller of the State of New York, alleging that the decedent was seized of personal property in the State of New York at the time of her death, applied to the surrogate to designate an appraiser to appraise the property of the decedent within this State, and this proceeding resulted in an order taxing the legatees under the last will and testament of Emily M. Lord, deceased, and from that order two of the beneficiaries appeal.

There are three separate funds involved. *First*, a trust fund created by a trust deed of March 13, 1873, the income thereof to be paid to Edward C. Lord during his life, with the power to dispose of the corpus of this fund by a last will and testament. By his last will and testament Edward C. Lord exercised this power in favor of his wife, and by this exercise of the power of appointment the title to this trust fund vested in her and passed under her will. *Second*, a trust created by the will of Susan Lord, who died in 1880, the income of which was to be paid to Edward C. Lord during his life,

with a power of appointment of the remainder after his death. This he exercised in favor of his wife, the decedent, and that property thus vested in her and passed under her will. And, *third*, the property bequeathed by Edward C. Lord to the decedent, his wife, which was subsequent to her death realized by the executor of Edward C. Lord, and the proceeds of the property paid by him to the executors of Emily M. Lord.

There is a distinction between the liability to taxation of the property acquired by the testatrix by the power of appointment contained in the will of her husband and the property that her estate received directly under her husband's will. The property that the estate of the testatrix received as the appointee of the power vested in her husband consisted of the first and second classes as before stated, and will, therefore, be considered separately from the third class of property acquired by the executors of the testatrix as property bequeathed to her by her husband. The property under the first trust created in 1873 was appraised by the appraiser at the value of \$5,970, and the property constituted by the trust of Susan Lord in 1880 was appraised at \$92,840.98. At the time of Edward C. Lord's death this property was held by trustees who were residents of this State, and the property was in this State. Upon the exercise of the power of appointment by Edward C. Lord the title to that property vested absolutely in his wife, her title relating back to the deed and will creating the trusts, and immediately upon the death of Edward C. Lord the title of the testatrix became absolute in the trust property. The property constituting these trust funds that was in this State at the time of her death, and which was transferred by her last will, was clearly taxable under chapter 483 of the Laws of 1885, as amended by chapter 713 of the Laws of 1887, and chapter 215 of the Laws of 1891, in force at the time of the death of the testatrix. I, therefore, agree with the court below that the property thus held by the trustee within this State as the property of the testatrix was taxable. As to the property of Edward C. Lord, which under his will passed to the decedent, and which under her will passed to her legatees, a different question is presented.

The situation in relation to this property is as follows: On the death of Edward C. Lord, on the 8th day of January, 1892, he had

App. Div.]

First Department, February, 1906.

in a safe deposit box in the city of New York certain securities, consisting of bonds and stock of various railroad companies, and cash on deposit in a bank in New York valued at \$144,363.21. By his will Edward C. Lord gave all his property to his wife, Emily M. Lord. Before this will was admitted to probate, and on January 18, 1892, Emily M. Lord died, leaving a last will and testament by which she left certain legacies to various individuals and corporations. After the death of Emily M. Lord the will of her husband, Edward C. Lord, was admitted to probate by the Probate Court of the State of New Jersey, and subsequently the will of Emily M. Lord was also admitted to probate by the said court, both being residents of Morristown in that State. Subsequently the executor of Edward C. Lord removed the securities of Edward C. Lord to the State of New Jersey and held the proceeds as part of the estate of Edward C. Lord. He subsequently paid to the executor of Mrs. Lord various sums of money, amounting in the aggregate to \$171,835.16, and this amount, with the proceeds of the trust property, constituted the estate of Mrs. Lord, which was distributed to the legatees under her will. From this amount there was paid to Franklin B. Lord, a legatee, the sum of \$8,227.63, upon which the surrogate has assessed a tax of \$211.38; and to William B. Lord, a legatee, the sum of \$4,113.81, upon which the surrogate has assessed a tax of \$205.69; and Franklin B. Lord and William B. Lord appeal from the order of the surrogate imposing this tax.

The question is as to whether the property of Edward C. Lord, which was in this State at the death of Mrs. Lord, was subject to taxation as passing under the will of Mrs. Lord under the law in force at the time of her death. That law (Laws of 1885, chap. 483, § 1, as amd. by Laws of 1887, chap. 713, and Laws of 1891, chap. 215) provides: "After the passage of this act, all property which shall pass by will \* \* \* from any person who may die seized or possessed of the same \* \* \* if the decedent was not a resident of this State at the time of his death, which property or any part thereof shall be within this State \* \* \* shall be and is subject to a tax at the rate hereinafter specified to be paid to the treasurer of the proper county and in the county of New York to the comptroller thereof for the use of the State; and all heirs, legatees, devisees, administrators, executors and trustees shall be liable for any

and all such taxes until the same shall have been paid as hereinafter directed."

The decedent in this case was not a resident of this State at the time of her death, and it was, therefore, only property which was actually within this State and which passed under her will that was subject to taxation; and the question is whether the property which her executors received as legatee of her husband and which passed under her will to these legatees was within this State at the time of her death. There can be no question but that certain personal property which belonged to her husband was at the time of his death within this State, and was not removed from this State until after the death of Mrs. Lord. Upon the death of Edward C. Lord, Mrs. Lord became entitled under his will as residuary legatee to all of his property, real and personal. As to the real property, that passed directly to her as a devise of the real estate. As to the personal property, the title to it vested in the executor, and the interest of the residuary legatee was, as stated in *Matter of Phipps* (77 Hun, 325; *affd.* on opinion below, 143 N. Y. 641, and quoted with approval in *Matter of Zefita, Countess de Rohan-Chabot*, 167 id. 280): "He had a right to claim the amount of money which his share of the residuary estate of Mrs. Fogg would result in, nothing more; no particular piece of property, no particular sum of money, no particular representatives of money or property. And until this residuary estate was ascertained by an accounting of the executors, the legatee might not be even able to maintain an action for its recovery. It would appear, therefore, that a tax in this proceeding has been levied upon a legacy which not only had never been realized, but the right to the possession of which had never accrued;" and this was the situation in relation to the testatrix's interest in the estate of Edward C. Lord at the time of her death. If this is a correct statement of the interest of Mrs. Lord in the personal property at the time of her death, it was a claim against the estate of a non-resident which could only be determined upon an accounting of the executors of that estate, and the amount subsequently received by the estate of the testatrix from the executor of that non-resident could not be said to be property within this State at the time of the death of the testatrix, irrespective of the location of the property which constituted the estate of the person

App. Div.]

First Department, February, 1906.

from whom the testatrix was entitled to receive the legacy. Neither the will of Edward C. Lord nor the will of Mrs. Lord was probated in this State. It was not necessary, to enforce the rights of the executors of Mrs. Lord against the estate of her husband, to come into this State. On the contrary, the courts of this State would have no jurisdiction over the foreign executors, without the proper probate of the wills in this State and the issuance of ancillary letters. In *Matter of Zefita, Countess de Rohan-Chabot* (*supra*), the will of the testator from whom the property came was probated in this State, the testatrix being a resident here. The debtor estate being administered here the property of the debtor estate to which the residuary legatee was entitled was property within this State and thus taxable. As was said by Judge VANN in *Matter of Houdayer* (150 N. Y. 41): "A reasonable test in all cases, as it seems to me, is this: Where the right, whatever it may be, has a money value and can be owned and transferred, but cannot be enforced or converted into money against the will of the person owing the right without coming into this State, it is property within this State for the purposes of a succession tax."

If this is the crucial test it would seem that this claim against the estate of an executrix appointed in the State of New Jersey was never property within this State, no matter where the property was located which constituted the estate of Edward C. Lord. Under this decision, if Mr. Lord had been a resident of this State, or if a mode had been provided for assessing the value of his personal property at the time of his death, his personal property which was in this State would have been taxable. The right that Mrs. Lord had in his estate, however, was not a right to the particular personal property which Mr. Lord had, but a right to the balance of the proceeds of Mr. Lord's property after the payment of his debts and the expense of administration of his estate. That right at the death of Mrs. Lord was solely a claim against the executor of Mr. Lord's estate and was not, therefore, as I view it, property within this State at the time of the death of Mrs. Lord.

It follows, therefore, that the amount received by the executor of Mrs. Lord from the executor of Mr. Lord was not property within this State and not subject to taxation.

The order appealed from must, therefore, be reversed and the

matter remitted to the surrogate to deduct from the assessed value of these legacies the amount received by the executor of Mrs. Lord from the estate of Mr. Lord, with ten dollars costs and disbursements of this appeal to the appellant.

O'BRIEN, P. J., PATTERSON, McLAUGHLIN and LAUGHLIN, JJ., concurred.

Order reversed and matter remitted to surrogate, with ten dollars costs and disbursements of appeal to appellant.

---

LEO SCHLESINGER, as Receiver of THE FEDERAL BANK OF NEW YORK, Appellant, v. ANDREW GILHOOLY, Respondent.

First Department, February 9, 1906.

**Preferred cause**—when action by receiver of corporation entitled to preference.

The receiver of a bank suing on promissory notes should be granted a preference on the calendar, although there has been delay in bringing action and in noticing the cause for trial, when the receiver has been ordered to make a final accounting and the trial of the action is necessary to enable the receiver to comply with the order of the court.

APPEAL by the plaintiff, Leo Schlesinger, as receiver of the Federal Bank of New York, from an order of the Supreme Court, made at the New York Trial Term and entered in the office of the clerk of the county of New York on the 26th day of December, 1905, granting the plaintiff's application for a preference.

*Stillman F. Kneeland*, for the appellant.

*Ernest Hall*, for the respondent.

INGRAHAM, J. :

The plaintiff brought this action as receiver of the Federal Bank of New York to recover upon two promissory notes made by the defendant, and applied to the Trial Term for a preference over other cases on the calendar, upon the ground that he had been directed by an order of the court to make a final accounting as



App. Div.]

First Department, February, 1906.

receiver on March 15, 1906, and that to comply with this order it was necessary that pending actions to which the receiver was a party should be tried and finally disposed of prior to that time. The plaintiff was awarded the preference allowed by subdivision 5 of section 791 of the Code of Civil Procedure, entitling him to have his case preferred over the cases noticed for the same term, but his application for a further preference was denied.

The action was commenced on November 26, 1904. On the 26th day of January, 1905, the defendant served an answer admitting the making of the notes, but alleging that the same were altered after they were made and delivered, and further alleging that the notes were delivered in pursuance of a usurious agreement between himself and one Muirhead, and that he is without knowledge or information sufficient to form a belief as to whether said notes were discounted by the Federal Bank. The objection of the defendant to the granting of this application was a tender consideration for the rights of other litigants which may be affected by giving this action a preference; but considering the necessity of a prompt settlement of the affairs of this insolvent corporation, and the peremptory order that has been granted requiring this plaintiff to file his accounts as receiver, we think the court might well have given to this case a preference.

It would appear that the main question here is whether the bank is a *bona fide* holder for value before maturity of these notes. That question can certainly be disposed of without a protracted trial, so that the rights of other litigants will not be seriously affected by allowing this action to be promptly disposed of. The delay of the plaintiff in promptly commencing the action and noticing the case for trial should not be given controlling influence in an action where the plaintiff sues as receiver. If the plaintiff were a private individual seeking to enforce his rights, I should be disposed to think that his failure to promptly notice the case for trial after it was at issue would be a sufficient reason for denying his application; but under the circumstances, I do not think that the delay should defeat the right of the people to have the offices of this insolvent corporation closed up as soon as possible; and to accomplish this and to enable the receiver to comply with the order of the court and render the final accounting at the time required, the order

should be reversed and the plaintiff awarded a preference on the Trial Term calendar, with ten dollars costs and disbursements of this appeal, to abide the final event of the action.

O'BRIEN, P. J., LAUGHLIN, CLARKE and HOUGHTON, JJ., concurred.

Order reversed and preference awarded, with ten dollars costs and disbursements to abide event.

---

DONALD GRANT, Respondent, v. THE CITY OF NEW YORK, Appellant.

First Department, February 9, 1906.

**Municipal corporations — not liable for salary of de jure officer while place filled by another — unnecessary for defendant to show which particular de facto appointee filled plaintiff's place after his dismissal.**

A police officer who has been reinstated by the court after a dismissal from the police force cannot recover from the municipality the amount of his salary during the period of dismissal when the quota of police officers was full and the city has paid the salary to another *de facto* incumbent of the office; this on the policy that the city shall not pay twice for the same service.

The fact that the city cannot point out which of three persons appointed to fill vacancies after the plaintiff's dismissal was actually appointed in the plaintiff's place furnishes no ground for liability.

HOUGHTON, J., dissented.

APPEAL by the defendant, The City of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 18th day of September, 1905, upon the decision of the court rendered after a trial at the New York Trial Term, a jury having been waived.

*Theodore Connoly*, for the appellant.

*William M. K. Olcott*, for the respondent.

INGRAHAM, J. :

The plaintiff was appointed an inspector of police of the city of New York on the 14th day of February, 1898, the salary attached to that position being \$3,500 per year. He continued to act as such inspector and received the salary therefor until the 4th day of Feb-

App. Div.]

First Department, February, 1906.

ruary, 1903, when, after a trial before the commissioner of police, he was dismissed from the force. At that time the charter (Laws of 1901, chap. 466, § 276, as amd. by Laws of 1901, chap. 730; Id. § 283) allowed the appointment of fifteen inspectors of police, and from the time that the plaintiff was removed down to the 23d day of June, 1903, there was at all times at least one vacancy in the position of inspector. On the 23d day of June, 1903, assuming that plaintiff and Cross had been dismissed, there existed three vacancies, and on that day three inspectors were appointed, thus making the full number of inspectors allowed by law. That continued down to the 22d day of April, 1904, when the plaintiff was reinstated by this court as an inspector of police (*People ex rel. Grant v. Greene*, 93 App. Div. 608). Subsequently Cross was also reinstated (*People ex rel. Cross v. Greene*, 98 id. 620). After the plaintiff and Cross were reinstated it was determined by the court at Special Term that the appointment of two of the three inspectors on the 23d day of June, 1903, was illegal. (*People ex rel. Albertson v. McAdoo*, 46 Misc. Rep. 517.) After the plaintiff was reinstated the city paid him his salary while there was a vacancy in the office of inspector, but declined to pay him for the period during which there were actually fifteen inspectors performing the duties of that office and receiving the salary allowed therefor, and it is to recover the salary for this period that this action is brought. The court found that between the time that the plaintiff was dismissed and reinstated to the office of inspector he performed no services as an inspector of police, and that the inspector duly appointed in his place actually performed the duties and received the compensation therefor. The court allowed a recovery upon the ground that the city was unable clearly to establish which of the three inspectors appointed on the 23d day of June, 1903, was appointed in the place of the plaintiff. At the time of the appointment of these three inspectors the situation was as follows: There was one vacancy caused by the retirement of an inspector; there was one vacancy caused by the dismissal of the plaintiff and one caused by the dismissal of Inspector Cross. And it was to fill these three vacancies that the three inspectors were appointed on the 23d day of June, 1903. The three appointed to fill these vacancies were

Wiegand, who was a veteran, and, under the provisions of section 9 of article 5 of the Constitution and section 20 of the Civil Service Law (Laws of 1899, chap. 370, as amd. by Laws of 1902, chap. 270), was entitled to a preference in appointment. Thus it is quite clear that he was entitled to the legal vacancy caused by the retirement of Inspector Clayton. Of the two other appointments, Baldwin and Albertson, it would seem that Baldwin was the first to qualify, and it is claimed by the defendant that he thereby took the position of the plaintiff, who had been dismissed prior to the dismissal of Inspector Cross. However, it is quite clear that Baldwin and Albertson took the places of the plaintiff and Cross. The court found that the defendant had failed to establish to which of the two officers who were appointed on June 23, 1903, the salary sought to be recovered in this action was paid; that to maintain this defense it was incumbent upon the defendant here to establish affirmatively who the *de facto* officer was — who the usurper was — and the particular *de facto* officer to whom was paid the salary which the plaintiff seeks to recover, and as defendant had failed in this respect awarded the plaintiff judgment.

It was said by Judge VANN in *Martin v. City of New York* (176 N. Y. 371): "It is well settled in this State that 'payment to a *de facto* public officer of the salary of the office, made while he is in possession, is a good defense to an action brought by the *de jure* officer to recover the same salary after he has acquired or regained possession,' and that the remedy of the latter is by action against the former. (*Dolan v. Mayor, etc., of N. Y.*, 68 N. Y. 274, 280, 281; *Mc Veany v. Mayor, etc., of N. Y.*, 80 N. Y. 185; *Terhune v. Mayor, etc., of N. Y.*, 88 N. Y. 247; *Demarest v. Mayor, etc., of N. Y.*, 147 N. Y. 208.) These decisions rest upon the principle that the public cannot be compelled to pay twice for the same services, and that the officer charged with the duty of paying salaries is not required to go behind the commission or the certificate of election and, at his peril, decide difficult questions of fact or law, but may make payment to the person who occupies the office and performs its duties." The reason of the rule is not that the officer can recover his salary from the *de facto* officer, but because the city when it has once paid for the services to an officer who was appointed by the appointing power and properly certified as regularly appointed and entitled to the

App. Div.]

First Department, February, 1906.

salary, cannot be required to pay for the same services to an officer who did not perform them. The city of New York was required by law to pay for fifteen inspectors of police a salary of \$3,500 per year each. (Charter, § 276, as amd. *supra*; Id. § 299.) The appointment of these inspectors was vested by law in the police commissioner. (Id. § 283.) Their salaries were required to be paid by the chamberlain on warrants drawn by the comptroller and countersigned by the mayor. (Id. §§ 149, 195, 151, subd. 5.) Fifteen inspectors of police were in office performing the duties of their office, appointed by the appointing officer and certified to by the civil service commissioners as the proper persons to whom the city should pay for the services rendered. Under the provisions of section 19 of the Civil Service Law, the comptroller was forbidden "to draw, sign or issue, or authorize the drawing, signing or issuing of any warrant on the" chamberlain "for the payment of" and the chamberlain was forbidden "to pay any salary or compensation to any officer, clerk or other person in the classified service \* \* \* of such city \* \* \* unless an estimate, payroll or account for such salary or compensation, containing the names of the persons to be paid, shall bear the certificate of the \* \* \* municipal civil service commission of such city, that the persons named in such estimate, payroll or account have been appointed or employed or promoted in pursuance of law and of the rules made in pursuance of law." As the principle is established that the city should not be again compelled to pay for the services that had been paid for to the one who actually performed them, in place of the *de jure* officer who was entitled to perform them, it seems to me that the payment to the officer whose appointment was valid on its face and who performed the services was a bar to the maintenance of an action by the officer who performed no services, but who was subsequently adjudged entitled to the office. The fact that the plaintiff cannot make up his mind as to which of the inspectors appointed on the 23d day of June, 1903, was appointed in his place does not prevent the city from proving that the salary was paid to the officer who was appointed in the place of the plaintiff for the services that the plaintiff was required by law to perform if he had been so allowed. It certainly would not have been an answer to this defense to prove that the *de facto* officer who performed the services and received the salary was insolvent and

unable to respond to a judgment of the *de jure* officer who seeks to recover the salary. If it appeared that plaintiff will be unable to recover any salary for this period during which he performed no services as a police officer it would be no answer to the position taken by the city that it has actually paid for the services for which the plaintiff now seeks to recover. The comptroller, mayor and chamberlain acted as they had a right to act upon the payroll certified to by the municipal civil service commissioners that the three inspectors appointed on the 23d day of June, 1903, had been appointed in pursuance of law and of the rules made in pursuance of law, as provided for by section 19 of the Civil Service Law (Laws of 1899, chap. 370). And having paid the salaries to the persons thus designated as having been duly appointed as provided by law, the city is not liable to any person because it subsequently appears that the person who had not performed the services had been improperly removed, and the appointment of the *de facto* officer who had performed the services and received the salary was unauthorized.

It follows, therefore, that the judgment appealed from should be reversed and a new trial ordered, with costs to the appellant to abide the event.

O'BRIEN, P. J., LAUGHLIN and CLARKE, JJ., concurred; HOUGHTON, J., dissented.

Judgment reversed, new trial ordered, costs to appellant to abide event.

---

EMILY R. CALDWELL and FRANK HARDY, Respondents, v. THE NEW YORK AND HARLEM RAILROAD COMPANY and THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellants.

First Department, February 9, 1906.

**Municipal corporations — fee of Fourth avenue in city of New York belongs to city — compensation for depreciation in value of abutting property by erection of railroad viaduct on said avenue.**

Whatever title to the surface of Fourth avenue, between Thirty-eighth and One Hundred and Thirty-fifth streets in the city of New York, may have been acquired before 1850 by the New York and Harlem Railroad Company, it was divested of that title when the city took the fee in said avenue between the streets aforesaid on condemnation proceedings in 1850.

App. Div.]

First Department, February, 1906.

Hence, a property owner on said avenue is entitled to compensation for interference with light and air and depreciation in value of said property caused by the erection of a viaduct by said railroad and its lessee on said avenue, as required of said railroad by the Laws of 1892, chapter 839.

Award of \$6,200 damages sustained.

REARGUMENT of an appeal by the defendants, The New York and Harlem Railroad Company and another, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 8th day of July, 1901, upon the decision of the court rendered after a trial at the New York Special Term.

In June, 1903, a decision was rendered in this and four similar cases reversing the judgments and ordering new trials (84 App. Div. 637). A reargument of this case was ordered in June, 1905 (105 id. 641).

*Alexander S. Lyman*, for the appellants.

*Edmund L. Mooney*, for the respondents.

INGRAHAM, J.:

This action was brought to restrain the defendants from maintaining and operating a railroad upon a structure in Fourth avenue opposite the plaintiffs' premises on the southwest corner of One Hundred and Twenty-ninth street and Fourth avenue, in the city of New York.

Prior to the year 1828 one Charles Henry Hall was the owner of the premises in question, and on the 16th day of September, 1828, Hall conveyed the premises to one Russel by a conveyance which would include the fee of the easterly half of Fourth avenue in front of the plaintiffs' premises. Subsequently, on the 1st day of May, 1834, Russel reconveyed this property to said Charles Henry Hall by the same description by which he had received title to the property. On the 10th day of October, 1839, Charles Henry Hall conveyed the premises to David P. Hall by a description which would convey the fee of the westerly half of the said avenue. By a resolution of the common council, approved by the mayor February 1, 1832, the New York and Harlem Railroad Company was permitted to construct and lay down, in pursuance of its act of incorporation (Laws of 1831, chap. 263), a double or single-track rail-

road along Fourth avenue from Twenty-third street to the Harlem river, provided that the width of such double or single track should not exceed twenty-four feet, with various conditions and provisos, which ordinance was accepted by the railroad company, who, by special agreement, promised, covenanted and agreed to and with the city of New York, "to stand, abide by and perform all the conditions and requirements in the said ordinance contained." Under this permit the railroad company constructed its road, and two tracks upon the surface of the ground were completed within the twenty-four-foot strip in the year 1837. By chapter 274 of the Laws of 1837 Fourth avenue was widened to a width of one hundred and forty feet. By deed dated January 18, 1832, recorded in the office of the register of the county of New York on August 18, 1835, Charles Henry Hall, although not then the owner of the fee of Fourth avenue in front of plaintiffs' property, executed a deed which conveyed to the Harlem Railroad Company a certain strip or parcel of land, being one of the avenues laid out on the map of the city of New York as Fourth avenue, and as included within a space of twenty-four feet wide running through the center of said avenue, between One Hundred and Twenty-seventh and One Hundred and Thirty-fifth streets. This strip of land is bounded northerly by the channel of the Harlem river, southerly by land belonging lately to the heirs of John F. Sickels, deceased, and east and west by lines drawn parallel to the center of Fourth avenue and each side thereof, a distance of twelve feet therefrom, with the power of sloping their embankments or excavations so much further than the lines of said premises thereinbefore granted as may be necessary to support their work, not, however, extending beyond the width of the avenue. No consideration was expressed and there is no evidence that the Harlem Railroad Company paid Hall any consideration. This conveyance of Hall to the Harlem Railroad Company did not convey this property, as, at the time of the conveyance, the westerly half of Fourth avenue, in front of plaintiffs' property, was owned by Russel, the deed conveying it to him having been duly recorded. It further appeared that in the year 1850 proceedings were taken by the mayor, aldermen and commonalty of the city of New York to open Fourth avenue as a street one hundred and forty feet wide from Thirty-eighth street to the northerly side of One Hundred and Thirty-fifth street, and that



App. Div.]

First Department, February, 1906.

by such proceedings the city acquired title to this land one hundred and forty feet wide for the purpose of Fourth avenue. Whatever interest in this strip of twenty-four feet had been acquired by the railroad company from Hall was, under this proceeding, acquired by the city of New York. The railroad company, however, continued to use the surface of the street for its road with a double track. Under an act of the Legislature (Laws of 1872, chap. 702) the railroad company was required to construct its railroad either above or below grade as therein prescribed, and it was authorized to use four tracks instead of two, and to take such additional space in Fourth avenue as might be needed for that purpose. Under this statute the railroad company excavated a cut in front of these premises about fifteen feet in depth and fifty feet in width at the bottom, with a slope of wall which increased the width of the cut to about sixty-one feet eight inches at the top. The distance from the side of the cut to the building line was about forty feet, of which about twenty-five feet were used as a highway and about fifteen feet for a sidewalk. This cut was crossed at One Hundred and Twenty-ninth and One Hundred and Thirtieth streets by bridges upon the surface of the streets, and the New York and Harlem Railroad Company and its lessees ran trains in this cut without interruption down to February 16, 1897. By chapter 339 of the Laws of 1892 the grade of said railroad was authorized and required to be changed, and the tracks were required to be carried past the premises on a viaduct of iron or steel, or of both, so that all streets from and inclusive of One Hundred and Twelfth street to the Harlem river should be passed over with a clear height of not less than fourteen feet above the surface of the pavement. This viaduct was completed and trains ran on it in the year 1897, since which time it has been in the exclusive possession of the New York Central and Hudson River Railroad Company as lessee of the New York and Harlem Railroad Company, and upon this viaduct the trains of this company are now operated.

It seems quite unnecessary to refer to the various cases decided by the Court of Appeals prior to the reversal by the Supreme Court of the United States of the cases of *Muhlker v. Harlem Railroad Co.* (197 U. S. 544) and *Birrell v. New York & Harlem R. R. Co.* (198 id. 390), for in the case of *Sander v. State of New York* (182 N. Y. 400) the Court of Appeals, referring to these various cases,

said: "But on appeal to the Supreme Court of the United States the *Muhlker* case, with several others which followed that decision, was reversed, the Supreme Court holding that under the decisions of this court in the elevated railroad cases abutting owners had special easements in a street, an invasion of which by the erection of a viaduct, without compensation for such invasion, was taking property without due process of law in contravention of the Federal Constitution. Of course, with the decision of the Supreme Court in the *Muhlker* case our own decisions in the cases cited have ceased to be authorities." Upon this record we think that any interest that the New York and Harlem Railroad Company acquired under the deed from Hall in 1832 was acquired by the city of New York under the condemnation proceedings under which the city acquired the title to the whole of Fourth avenue from Thirty-eighth street to the Harlem river and 140 feet in width. The Harlem railroad was a party to that proceeding. The fee of the whole avenue was acquired in that proceeding, and an award was made to the Harlem Railroad Company for its property taken. There can be, I think, no question but that by that proceeding the fee of the avenue vested in the city under chapter 86 of the Revised Laws of 1813, to be held by the city in trust for a public street. This ownership of fee was not at all inconsistent with the right that the New York and Harlem Railroad Company had acquired under its contract with the city of New York to maintain tracks upon the surface of the avenue and operate its road upon those tracks; but after the fee of the avenue was acquired by the city under these proceedings, the sole right of the defendant, the New York and Harlem Railroad Company, in and to Fourth avenue was the right that it had acquired under the ordinance of the city of 1832 and its contract with the city based upon that ordinance. Any interest in Fourth avenue that the railroad company had acquired under the Hall deed, or any title to the avenue having been thus divested, Fourth avenue became one of the public streets of the city of New York, and the abutting owners acquired the same right to Fourth avenue as a public street as the abutting owners upon other streets in the city of New York which had been opened under the act of 1813 had acquired. Russel, the grantee of Hall in 1828, acquired the fee of that street and his grantees continued the owners of the fee of the street until that fee was taken

App. Div.]

First Department, February, 1906.

from them under the condemnation proceedings instituted in 1850, by which the city of New York acquired the fee of Fourth avenue. When Hall attempted to make this conveyance to the Harlem Railroad Company he had already conveyed the westerly half of Fourth avenue to Russel. There was no warranty of title in Hall's deed to the railroad company and consequently the title to the street that Hall subsequently acquired by the conveyance from Russel did not by way of estoppel vest in the New York and Harlem Railroad Company, but passed by a subsequent conveyance to his grantees from whom it was divested by the condemnation proceedings. So it seems to me that in whatever way we may look at this case the Harlem Railroad Company never acquired any title to the fee of Fourth avenue in front of the plaintiffs' premises, and never acquired any right to use any portion of this avenue, except the right that it acquired to use the surface under the ordinance of the city of New York. Under the act of 1872 the track was depressed below the surface. This, presumably, was with the consent of the municipality and under the direction of the Legislature, but it imposed no burden upon the abutting property, as the trains were run below the surface of the ground and the rights of abutting property to air, light and access were not interfered with. When, however, in 1897 this viaduct was completed and taken possession of by the defendants there was appropriated by the railroad company in constructing and maintaining this viaduct the right of the abutting owners in this street, and the taking of that property without compensation, by either the State or a railroad company under the direction of the State, was a violation of subdivision 1 of section 10 of article 1 and section 1 of the 14th amendment of the Federal Constitution as well as section 6 of article 1 of the Constitution of this State, and so the Supreme Court of the United States expressly decided in the *Muhlker Case* (*supra*).

The only question, therefore, that seems to us to be open is whether the awards made by the court for this property were sustained by the evidence and whether error was committed upon the trial which requires a reversal of the judgment.

There are no exceptions to rulings upon evidence which require examination, as they have all been disposed of by other cases. The court awarded to the plaintiffs \$6,200 damages caused to the rental

value of the property by reason of the trespass. This was a period from February 16, 1897, to June 12, 1901, four years and four months, which was at the rate of about \$1,430 a year. The evidence shows that the rents actually collected for the year 1892 were \$4,098.50, and that the total rent collected for the years 1897, 1898, 1899 and 1900 aggregated \$10,236.50. If the plaintiffs had been able to collect the rentals that they received in the year 1892 or 1893 for these four years, the amount would be at the 1892 rate, \$16,384, and at the 1893 rate, \$15,790. There is no cause suggested in the record for the decrease of the rent, except this structure on Fourth avenue, and if the decrease of rental for these four years is attributed to the existence of the defendants' road, the amount is in excess of that allowed by the trial court. I think, therefore, that the award made for rental damage was justified by the evidence. The court awarded as the depreciation in the fee value of the property the sum of \$11,720. The testimony of the expert is that this property was in 1892 about \$69,000; that in the year 1897 the value was \$57,542, and in 1901, \$44,356. This shows a depreciation in value between 1892 and 1901 of over \$24,000.

I think this testimony justified the award for fee damage, and my conclusion is that the judgment appealed from was right and should be affirmed, with costs.

O'BRIEN, P. J., LAUGHLIN, CLARKE and HOUGHTON, JJ., concurred.

Judgment affirmed, with costs.

---

SARAH A. BLY, Respondent, v. THE EDISON ELECTRIC ILLUMINATING COMPANY OF NEW YORK, Appellant.

First Department, February 9, 1906.

**Nuisance — damages to lessee of adjoining property by operation of electric light plant.**

A lessee is entitled to damages for the depreciation in the "usable value" of the premises caused by the operation of an adjoining electric light plant which constitutes a nuisance.

When it is shown that such plant discharged smoke, steam, cinders and noisome vapors upon plaintiff's premises, made loud and incessant noise, caused jar and vibration, necessitated constant cleaning of plaintiff's premises, and that

App. Div.]

First Department, February, 1906.

between the time the power house was built and the plaintiff left the premises, a period of five years, the number of boarders in the plaintiff's house decreased from twenty-five to fifteen with a corresponding decrease in receipts, etc., a verdict of \$4,000 is warranted by the evidence.

APPEAL by the defendant, The Edison Electric Illuminating Company of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 4th day of May, 1905, upon the verdict of a jury, and also from an order entered in said clerk's office on the 5th day of May, 1905, denying the defendant's motion for a new trial made upon the minutes.

*J. Haviland Tompkins*, for the appellant.

*George J. McEwan*, for the respondent.

INGRAHAM, J.:

The nature of this action and the questions presented are stated in the opinion of this court (54 App. Div. 427) and in the Court of Appeals (172 N. Y. 1) upon a former appeal from a judgment in favor of the plaintiff. It seems that two actions were commenced; one in equity for an injunction to restrain the continuance of a nuisance, and the other at law to recover damages for the maintenance of the nuisance. The equity action, having been brought on for trial, resulted in a judgment awarding the plaintiff an injunction and \$4,000 damages. From that judgment the defendant appealed to this court, where the judgment was modified by reducing the amount of damage to six cents, and as thus modified affirmed. Upon appeal to the Court of Appeals the action of this court in reducing the damages was disapproved, but the judgment was reversed on account of an error of the trial justice and a new trial ordered. The plaintiff's lease of the premises having expired, these two actions were consolidated and tried as an action at law which resulted in a verdict for the plaintiff for \$4,000 as the damages that she had sustained in consequence of the nuisance maintained by the defendant, and from that judgment the defendant now appeals. This court upon the former appeal affirmed the judgment of the court below in so far as it found that the defendant maintained a nuisance, and the finding of the jury to the same effect is, according to our former decision, sustained by the evidence.

In *Bates v. Holbrook* (89 App. Div. 548; appeal dismissed, 178 N. Y. 568) we had occasion to examine the question as to the proper measure of damages where the lessee of a building contiguous to a nuisance maintained by the defendants was injured thereby, and we held that it was the diminution in the usable value of the premises to the occupant caused by the wrongful act that is the measure of damages; that "usable value" means the value of the use of the premises to the occupant, as distinct from the rental of the premises reserved in the lease by the owner to the tenant.

In directing a new trial in this case the Court of Appeals held that the plaintiff, as lessee, had a cause of action against the defendant for the damages caused by the nuisance, the court saying: "If the act complained of is a nuisance, it is a wrong, the existence of which cannot be justified at any time as against any one injuriously affected thereby. If this is the rule, is it any less applicable in favor of tenants, whose term begins during the continuance of the nuisance than in favor of subsequent owners?" and in answering that question the court say: "Several propositions seem to be quite satisfactorily established, therefore, both upon principle and by authority. 1. That an owner of property affected by a nuisance may maintain an action to recover his damages, or to abate the nuisance, or both, no matter whether he takes his title before or after the introduction of the nuisance. 2. That a landlord and his tenant have separate estates for injuries to which each may have his appropriate remedy. \* \* \* The last owner or occupant, when he acquires his property or possession, acquires with it all the rights which by law belong to it, and exemption from wrongful injury by a contiguous proprietor is one of them." It was also held that the plaintiff was entitled to recover only the damages accruing to her as the occupant of the premises prior to the commencement of the action. The only question, therefore, which seems to be open is whether the plaintiff was entitled to recover the amount awarded to her by the jury.

The evidence shows that the defendant had constructed upon certain property owned by it, about 175 feet distant from the property occupied by the plaintiff, a large building as a powerhouse and had placed therein numerous steam boilers, steam engines, steam pipes, dynamos, electric machines, elevators, shafting, pulleys

App. Div.]

First Department, February, 1906.

and other machinery for the purpose of generating electricity to be supplied by it to the general public for lighting and other purposes, and that the defendant had so constructed and conducted the property and constructed and operated the machinery as to discharge upon the premises of the plaintiff quantities of soot, cinders, ashes and noisome gases, unpleasant odors, steam and water condensing from steam, and had also made and produced in the operation of its machinery loud, disagreeable and incessant noises, and a very great jar and vibration which were transmitted into and through the premises of the plaintiff.

The defendant admits that in the year 1887 it became possessed of and still is in the exclusive possession of this property and has built upon it a building and placed therein steam boilers, steam engines, steam pipes, dynamos, electrical machines, and other machinery for the purpose of generating electricity to be supplied by it to the general public for lighting and other purposes. There was evidence that the building occupied by the plaintiff was affected by the continual vibration caused by the defendant's occupation of its property; that the chandeliers and windows continuously shook and rattled; that everything in the house felt as if it were pulsing in some way; that the windows had to be plugged up; and that the vibration of the building continued day and night; that after the construction of the defendant's powerhouse there was a change in the atmospheric conditions surrounding the house; it became smoky and soot fell in the yard and came in the windows during all the time that the defendant conducted its operations; that cinders and ashes damaged the curtains when the windows were open, and the inside of the house had to be cleaned continuously to keep it in order; that immediately after the erection of the defendant's building the noise and vibration commenced and continued, growing worse from year to year as the defendant increased its power, to February, 1900, when the plaintiff left the premises; that the plaintiff leased these premises, paying \$3,000 a year rent, conducting a boarding house thereon; that the house accommodated about twenty-five people and was continuously well filled up to the time the powerhouse was built in 1888; that after the defendant constructed its powerhouse the average number of boarders fell from twenty-five to about twenty, and further decreased down to

1903, when the plaintiff left the premises, to about fifteen; that there was a decrease in the receipts after the powerhouse was built from twenty-five to fifty dollars a week, and that the receipts constantly decreased; that during the time of this decrease there was no change in the cost of maintaining the house for servants, lighting and incidental expenses or rent, other than the cost of provisions.

These conditions having been proved, the question as to the amount of the damage sustained by the plaintiff in consequence of the nuisance was a question for the jury, and its verdict was sustained by the evidence. There is no serious question as to rulings upon evidence. The charge was fair and no exception to it requires consideration.

It follows that the judgment and order appealed from should be affirmed, with costs.

O'BRIEN, P. J., LAUGHLIN, CLARKE and HOUGHTON, JJ., concurred.

Judgment and order affirmed, with costs.

---

HENRY E. FOX, Respondent, v. ISAAC DAVIDSON, Appellant.

First Department, February 9, 1906.

**Mechanic's lien — damages — when interest not recoverable in action to foreclose lien.**

When in an action to foreclose a mechanic's lien certain work has been left undone by the contractor, the cost of completing which affects the amount of plaintiff's recovery, his claim is not liquidated and an allowance of interest on his recovery is not proper.

APPEAL by the defendant, Isaac Davidson, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 20th day of June, 1905, upon the decision of the court rendered after a trial at the New York Special Term.

*Henry A. Forster*, for the appellant.

*Edmund L. Mooney*, for the respondent.



App. Div.]

First Department, February, 1906.

LAUGHLIN, J.:

This is an action to foreclose a mechanic's lien. It is said to have been before this court in one phase or another six times, and attention is drawn to three opinions on appeal herein (*Fox v. Davidson*, 36 App. Div. 159; 40 id. 620; *Davidson v. Fox*, 65 id. 262). The law of the case under the amended complaint is well settled. We do not deem it important on this appeal to review either the facts or the law on the main issues for the reason that the trial involved the application of facts found to the settled principles of law with respect to the right to recover in such an action when full and substantial performance has been waived or prevented by the defendant, and the excuse for non-performance has been properly pleaded, and where the lien as filed was excessive but the claim was not willfully exaggerated. We have considered all of the points presented by the appellant, and have reached the conclusion that the learned trial justice properly decided the issues in all respects, except in allowing a recovery for interest. In his amended complaint plaintiff demanded judgment for \$7,355 principal and interest thereon. His recovery was for only \$5,484.90. The amount of the plaintiff's claim depended upon, among other things, the reasonable value of certain work, labor and material embraced in the contract but left unperformed by the contractor. This required proof both as to the items of work not done and the fair value of performing the same according to the contract. The precise amount due to the plaintiff was neither fixed nor could it be ascertained by a mere mathematical calculation; and, therefore, it cannot be said that the claim was liquidated and drew interest. (*Excelsior Terra Cotta Co. v. Harde*, 90 App. Div. 4; *affd.*, 181 N. Y. 11.)

It follows that the judgment should be modified by reducing the recovery by \$2,594.34, the amount of interest allowed, and as so modified affirmed, without costs.

O'BRIEN, P. J., INGRAHAM, CLARKE and HOUGHTON, JJ., concurred.

Judgment modified as directed in opinion and as modified affirmed, without costs. Settle order on notice.

In the Matter of the Estate of SOLOMON W. ASHHEIM, Deceased.  
AARON COHN, as Executor, etc., of SOLOMON W. ASHHEIM, Deceased,  
Appellant; SAUL W. WOLFENSTEIN and DAVID WOLFENSTEIN,  
Respondents.

First Department, February 9, 1906.

**Executors — when executor cannot avail himself of Statute of Limitations on an accounting.**

An executor in possession of trust funds which he has failed to turn over to a trustee named in the will cannot set up the Statute of Limitations in a proceeding by the beneficiaries to compel him to account. The statute does not commence to run in favor of an executor until he openly repudiates the trust and asserts and exercises individual ownership over the property, and the question as to whether the statute has run will not be decided until after an accounting.

APPEAL by Aaron Cohn, as executor, etc., of Solomon W. Ashheim, deceased, from a decree of the Surrogate's Court of the county of New York, entered in said Surrogate's Court on the 1st day of November, 1905, directing him to file an accounting of his proceedings as such executor.

*Sol. A. Cohn*, for the appellant.

*John De Witt Warner*, for the respondents.

LAUGHLIN, J. :

The letters testamentary were issued to the appellant on the 25th day of October, 1884, and they have not been revoked. The executor filed no inventory and he has never accounted. By a codicil duly admitted to probate with the will, the testator gave the sum of \$48,000 to the United States Trust Company of the city of New York, "in trust to invest the same and to receive the income and interest accruing thereon and to apply such income and interest to the use of" his sister Jeanette during her life, and on her decease he directed that said trust fund be distributed among such of her children as survived her and then the living issue of any deceased child, "to be divided between them *per stirpes* and not *per capita*." The proceeding for the accounting was instituted on the 6th day of September, 1905, by two surviving children of a deceased child of said Jeanette Cohn, who are together entitled to receive one-eighth of

App. Div.]

First Department, February, 1906.

said fund. The life beneficiary of the trust fund is still living. The moving papers show that the estate that came into the hands of the executor was more than sufficient to pay all debts, expenses, bequests and legacies, including the trust fund of \$48,000 to the trust company, but that the executor has failed, neglected and refused to pay over to the trust company the said sum of \$48,000, and has held, controlled and managed, and still holds, controls and manages, the said fund contrary to the terms and provisions of the codicil. On the return day of the citation the executor filed an answer alleging "that this proceeding was commenced after the expiration of seven years, and after the expiration of ten years from the grant of letters to this respondent," but not denying any of the facts set forth in the moving papers.

It is strenuously urged that as the executor was not a trustee in the strict sense of the term he has obtained individually, by the mere lapse of time, good title to this property that came into his hands as executor under a commission from the court by which he was required to account therefor, and that the Statute of Limitations is a bar to the proceeding. This court has frequently held that the Statute of Limitations does not commence to run in favor of a trustee until he openly repudiates the trust and asserts and exercises individual ownership over the trust property. (*Matter of Irvin*, 68 App. Div. 158; *Matter of Jones*, 51 id. 420.)

We have also in the interest of honesty extended the rule by analogy to the case of *executors* who are trustees in a sense, even though they be not, strictly speaking, trustees; and we have established the rule that unless the facts, upon which the running of the Statute of Limitations depends, are clear and uncontroverted, mere lapse of time is not a bar to the accounting, and that the question as to whether the Statute of Limitations is a bar to any claim made by the petitioners should not be decided before the accounting is had. (*Matter of Irvin, supra*; *Matter of Meyer*, 98 App. Div. 7; *affd.*, 181 N. Y. 553.) In these cases we reviewed the principal authorities upon which the appellant relies, and it is not necessary to distinguish them again. Here the Statute of Limitations may or may not be a bar. Many material facts essential to a correct decision of the question are not disclosed. The executor relies on the mere lapse

of time, which alone is not a defense to a proceeding to compel him to account. Not only has this rule been frequently promulgated by this court, but it has been finally approved by the Court of Appeals in affirming our decision in *Matter of Meyer (supra)* on the opinion of this court, and answering in the negative the question certified: "In the absence of any act of an executor repudiating his liability as trustee, is the lapse of thirteen years and nine months from the time of the issue of letters testamentary a bar to a proceeding to compel the executor to account?"

Therefore, the question as to whether the right of the petitioners to compel the executor to pay over this fund to the trust company is barred by the Statute of Limitations must be left open, and the order requiring the executor to account should be affirmed, with ten dollars costs and disbursements.

O'BRIEN, P. J., INGRAHAM, CLARKE and HOUGHTON, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

---

FRANCIS J. MARKHAM, Respondent, v. DAVID STEVENSON BREWING COMPANY, Appellant.

First Department, February 9, 1906.

**Damages — interest not recoverable on breach of covenant by tenant to repair — practice — when objection sufficient.**

A tenant who has covenanted to make all repairs and has failed to do so is not chargeable with interest on the sum recovered by the landlord in an action for damages for the breach of the covenant. Such damages are not ascertainable by computation, even though the landlord made the repairs at his own cost on the tenant's default.

An objection to the allowance of such interest is timely if made when the court directs it to be added to the verdict. It need not be made before the jury goes out.

APPEAL by the defendant, the David Stevenson Brewing Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 30th day of June, 1905, upon the verdict of a jury, and also from an order entered in said clerk's office on the 26th day of June,

App. Div.]

First Department, February, 1906.

1905, denying the defendant's motion for a new trial made upon the minutes.

*Gratz Nathan*, for the appellant.

*John H. Corwin*, for the respondent.

LAUGHLIN, J. :

The plaintiff leased certain premises in the city of New York to the appellant, and the action was brought to recover the sum of \$3,450 damages alleged to have been sustained by the landlord through the failure of the tenant to keep its covenant "to make all and every repair of every description whatsoever, both inside and outside of the house, and about the demised premises, and to the roof of the said buildings, at his own proper costs and expense," and "to comply with all the regulations and orders of the Health, Police and Fire Departments, and also all the Municipal Departments of said City," and to leave the premises at the expiration of the term "in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted."

The decision of this court on a former appeal established the right to recover and disposes of all questions arising on this appeal excepting the right of the plaintiff to recover interest and the award of an additional allowance of costs. (104 App. Div. 420.) The court, on submitting the case to the jury, excluded from their consideration the *amount* of interest by directing that they render a verdict for the damages "with interest." When the sealed verdict was reported, the court added the interest before the verdict was entered. The defendant duly excepted to the direction to add interest. There was no waiver of defendant's right to object to the allowance of interest by its failure to except when the jury went out. The exception taken when by direction of the court the interest was added was timely. The right of the plaintiff to recover interest depends upon whether the claim for damages for breach of the covenants was liquidated.

Owing to its age and dilapidated condition the building became unsafe and the building department required certain extraordinary and extensive repairs to be made. The tenant failed to comply with the order. The landlord made the repairs and has recovered

as damages the cost thereof. No question appears to have been raised on the trial as to the reasonableness of any disbursement made by the landlord for repairs. The litigation was over the items of repairs for which the tenant was liable. The right to recover interest is not affected by the fact that the landlord made the repairs. His cause of action accrued upon the breach of the covenants to make the repairs, and he might have maintained the action without making the repairs. His measure of damages, so far as material to the present inquiry at least, would necessarily be the same in either case. He could only recover the reasonable cost of making the repairs. Having made the repairs, he could recover the amount expended for repairs, which it was the duty of the tenant to make, upon proving that it was the fair and reasonable cost of the work. It is manifest that different builders might differ as to the nature and extent of repairs that would be necessary and suitable and properly chargeable to the tenant and as to the cost of making the same. It is difficult to perceive how the defendant could have ascertained, even approximately, the amount of its liability to the plaintiff to enable it to tender the same. The question depended on proof and could only be authoritatively determined by a verdict or decision.

The respondent relies on the case of *Sweeny v. City of New York* (173 N. Y. 416). That was an action on a *contract* to recover the contract price of removing the walls and debris after the old Windsor hotel fire. The contract price of the work was not a gross sum, but a given price per cubic yard of material removed and for each day's labor required. After completing the work the contractors presented a claim for the balance of the contract price computed on the basis prescribed in the contract. It was held that the damages were capable of ascertainment by mere calculation and that interest was recoverable. If the city had supervised the work it would have known how much material was removed and the number of days' labor employed. The court did not intend to modify the rule of the common law that a demand must be liquidated or the amount thereof ascertained before interest is recoverable farther than that rule had been previously modified in this State by the qualification that "if the amount due is capable of being ascertained by mere computation, the allowance of interest is proper" but not otherwise. (*Excelsior Terra Cotta Co. v. Harde*, 181 N. Y. 11, affg. 90 App.

App. Div.]

First Department, February, 1906.

Div. 4; *Delafield v. Village of Westfield*, 41 id. 24; *affd.*, 169 N. Y. 582.)

It is quite clear, I think, that the damages for which the defendant is liable were not ascertainable by a mere computation, and, therefore, interest was not recoverable. The facts were not complicated, but the case involved novel legal propositions, making it difficult and extraordinary, and the discretion of the trial justice was properly exercised in granting the additional allowance.

It follows that the judgment should be modified by deducting from the recovery \$685.47, the amount of the interest, and reducing the additional allowance to five per cent upon the verdict exclusive of interest, thus reducing the judgment as entered, including costs and extra allowance, to the sum of \$1,862.27, and the judgment as so modified and the order appealed from should be affirmed, without costs.

INGRAHAM and McLAUGHLIN, JJ., concurred; O'BRIEN, P. J., dissented.

Judgment modified as directed in opinion and as modified the judgment and order appealed from affirmed, without costs.

---

CHARLES E. FENNESSY, Respondent, v. GERTRUDE VICTORIA FENNESSY, Appellant.

First Department, February 9, 1906.

**Preferred cause — husband failing to pay alimony not entitled to preference in action for divorce.**

A husband who has been ordered to pay temporary alimony and counsel fees in an action for divorce and has failed to do so is not entitled to move for a preference under section 791, subdivision 13, of the Code of Civil Procedure.

When a counsel fee is awarded, the wife is entitled to have it paid a reasonable time before the trial to the end that she may have her case properly prepared.

APPEAL by the defendant, Gertrude Victoria Fennessy, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 8th day of January, 1906, granting the plaintiff's motion for a preference.

*Alfred Beekmann*, for the appellant.

*MacDonald De Witt*, for the respondent.

LAUGHLIN, J. :

This is an action for divorce. On the 11th day of December, 1905, the court on the application of the defendant made an order requiring the plaintiff to pay one hundred dollars counsel fee and ten dollars per week alimony until the further order of the court. The motion for a preference was based on subdivision 13 of section 791 of the Code of Civil Procedure which authorizes a preference in an action for divorce when temporary alimony has been allowed. The opposing affidavits show that the order of the court, which was duly served on the attorney on the twelfth day of December, but could not be served on plaintiff personally owing to his absence from the State, requiring the payment of counsel fees and alimony, has not been complied with.

The preference was designed for the protection of husbands paying counsel fees or alimony by affording them a speedy trial of the issues to the end that, if innocent, they might be soon relieved from the order. This husband is attempting to take advantage of it to avoid the payment of counsel fees and alimony. He should not be heard on any proceeding in the action *instituted by himself* until he complies with the order of the court requiring the payment of counsel fees and alimony; but of course he has a constitutional right to be heard on any affirmative steps taken by the defendant. (*Sibley v. Sibley*, 76 App. Div. 132.) When a counsel fee is awarded in this class of cases the wife is entitled to have it paid a reasonable time before the trial to the end that she may have her case properly prepared. We are of opinion that for that reason the motion should have been denied.

It follows, therefore, that the order should be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

O'BRIEN, P. J., INGRAHAM, CLARKE and HOUGHTON, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.



THE PEOPLE OF THE STATE OF NEW YORK ex rel. CLARENCE H. VENNER and Others, Respondents, v. THE NEW YORK LIFE INSURANCE COMPANY and Others, Appellants.

First Department, February 9, 1906.

**Life insurance — mutual company without stock is not a stock corporation — mandamus to compel allowance of inspection of list of members not a statutory right — common-law writ in discretion of court — when such writ will be refused.**

As the New York Life Insurance Company is a mutual company, without stock, it is not within the provisions of section 29 of the Stock Corporation Law, requiring stock corporations to keep a book containing a list of stockholders and to allow an inspection thereof. Hence a policyholder in said company has no statutory right to a mandamus requiring said company to allow an inspection of its list of policyholders.

Legal position of policyholders in said company discussed.

Apart from said statute, however, there is a common-law right to an inspection by a policyholder of the list of members, and mandamus may issue to enforce the same. But the issuance of such common-law writ is not a matter of right, but rests in the discretion of the court.

When in an application for such common-law mandamus by a policyholder and ninety one other policyholders it appears that the only list of policyholders kept by said company is on cards which contain not only the policies in force, but those which have expired, and contains also the amounts of said policies, the names of beneficiaries and matters of a private and personal nature which such members may not care to have made public, and there are facts tending to show that the petitioner is a professional litigant, the court in the exercise of a sound discretion should deny the issuance of such writ.

Houghton, J., dissented.

APPEAL by the defendants, The New York Life Insurance Company and others, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 4th day of January, 1906.

*John G. Milburn* [*James H. McIntosh, Langdon P. Marvin* with him on the brief], of counsel; *Carter, Ledyard & Milburn*, attorneys, for the appellants.

*George H. Yeaman*, of counsel [*Stephen M. Yeaman*, attorney], for the respondents.

CLARKE, J. :

This is an appeal from a final order directing the issue of a peremptory writ of mandamus commanding the defendants, The New

York Life Insurance Company, its president and secretaries, to forthwith permit the petitioners and their agents, attorneys and assistants, to inspect any and all records of the said New York Life Insurance Company, which show who are the policyholders of the defendant, and to copy therefrom the names and post office addresses of all the policyholders, during business hours, at the principal office thereof in the city of New York, and to give the petitioners and their said attorneys, agents and assistants all reasonable facilities for doing the same.

The petition alleges that Venner and the ninety-one other petitioners are policyholders in the defendant company; that said company is a corporation organized and existing under the laws of the State of New York engaged in the business of life insurance; that it has no capital stock and no stockholders, and is entirely an insurer of lives upon the mutual plan, "and by the terms of its charter and the laws of New York, each holder of a life insurance policy issued by the said New York Life Insurance Company is a member of the corporation and is entitled to vote at every election of trustees thereof;" that the petitioners desire to obtain full and free conference and consultation with other policyholders of the company, with the view to lawfully and properly influencing the election of trustees, and this they cannot do without a list of the names and addresses of other policyholders; that an application for leave to inspect the books of the company to obtain such names and addresses had not been complied with, and, therefore, they prayed for the issuance of a writ of mandamus.

In answer, it is alleged that the number of policies now in force amounts to 750,000 or thereabouts; that there are no books in which the list of the names and addresses of policyholders are entered; that the department of the company in which are contained the records which furnish most of the data desired by petitioners is known as the Division of Policy Briefs; that these records consist of cards numerically arranged, each policy ever issued by the company having its card, whether now in force or not; that there are probably a million and a half of these cards; that even these cards do not give the addresses of all the policyholders whose policies are in force; that these cards contain, in addition to the name and address, a variety of information, the

occupation, race and age of the insured, the name of the beneficiary, the amount and plan of the policy, the dividend class, the premium, and other matters; that these cards are constantly in use by the officers and employees of the company, and that to allow another force of clerks access to these records, in addition to the examination now going on by the commissioners of five States, would make it impracticable for the company to carry on its business. It is further alleged that the petitioner Venner is notoriously a professional litigant, and is well and widely known for acquiring small interests to create controversies to obstruct the consummation of important corporate transactions, and there are incorporated extracts from various judicial records and published opinions of various State and Federal courts tending to establish that allegation.

There is no statute authorizing the inspection here demanded. Subdivision 2 of section 3 of the General Corporation Law (Laws of 1892, chap. 687, as amd. by Laws of 1895, chap. 672) provides that "A stock corporation is a corporation having a capital stock divided into shares, and which is authorized by law to distribute to the holders thereof dividends or shares of the surplus profits of the corporation." Section 29 of the Stock Corporation Law (Laws of 1892, chap. 688, as amd. by Laws of 1901, chap. 354) provides that "Every stock corporation shall keep at its office \* \* \* a book to be known as the stock-book, containing the names, alphabetically arranged, of all persons who are stockholders of the corporation, showing their places of residence, the number of shares of stock held by them respectively, the time when they respectively became the owners thereof, and the amount paid thereon. The stock-book of every such corporation shall be open daily, during at least three business hours, for the inspection of its stockholders and judgment creditors, who may make extracts therefrom." A penalty is provided for failing to keep such book open for inspection as therein required. By this provision a duty is imposed upon the stock corporation, and a clear legal right conferred upon the stockholder. Upon a denial of this right it is the duty of the court to issue its writ of mandamus. "To the extent, however, that an absolute right is conferred by statute, nothing is left to the discretion of the court, but the writ should issue as a matter of course, although even then, doubtless, due precautions may be taken as to time and place, so as to prevent interruption of

business or other serious inconvenience." (*Matter of Steinway*, 159 N. Y. 263.)

But the defendant company is not a stock corporation; nor is the petitioner a stockholder therein. It is not required by law to keep a stock book, and it does not keep any stock book, for it has no stock. It is not required to keep a book containing the names and addresses of policyholders, and it does not keep any such book. No legal obligation has been violated by it in not keeping such a book, and the petitioner has not been deprived of any clear statutory right upon which a mandamus issues as a matter of course. But it is claimed, and it is true, that the right to inspect the stock book given by the statute is not exclusive; that irrespective of the statute there exists a common-law right to inspect, in proper cases, the books of a corporation which can be enforced by mandamus. The issuance of this writ is, however, not a matter of strict right, but is discretionary. In *Mutter of Steinway* (*supra*) Judge VANN said: "We think that according to the decided weight of authority, a stockholder has the right at common law to inspect the books of his corporation at a proper time and place and for a proper purpose, and that if this right is refused by the officers in charge, a writ of mandamus may issue, in the sound discretion of the court, with suitable safeguards to protect the interests of all concerned. It should not be issued to aid a blackmailer, nor withheld simply because the interest of the stockholder is small; but the court should proceed cautiously and discreetly, according to the facts of the particular case."

Proceeding cautiously and discreetly, according to the facts of the particular case at bar, it appears that the principal petitioner is not a stockholder, and is not possessed of the rights of a stockholder. He is a policyholder in a mutual life insurance company. The relation between a policyholder and the mutual company in which he is insured is primarily one of contract measured by the terms of his policy. (*Uhlman v. New York Life Ins. Co.*, 109 N. Y. 429, and cases cited.) He has by his policy — his contract with the company — the right to vote for trustees. There are many rights which a stockholder has in relation to his company which a policyholder does not possess. The stockholder has the right to participate in the making of by-laws, to vote upon questions referred to the stockholders by the directors, and to bring suit for the benefit of the

company where the directors upon proper request refuse. The stock owned by him makes him the equitable owner of an undivided fractional part of the entire assets of the company. (*Flynn v. Brooklyn City R. R. Co.*, 158 N. Y. 504.) The policyholders may, and do, hold many different kinds of policies. The policyholder has no power to participate in the management of the company, further than is given by his contract and the charter of the company — in this instance to vote for trustees. Before the maturity of his policy he is the holder of an unmatured claim against the company; after its maturity he is a general creditor with a liquidated claim. The stockholder's rights in the profits of the business flow from his proprietary interest, and have no analogy to the rights of a contract creditor. The right to inspect the books of the corporation and to take extracts therefrom is one of the rights which belong to him as a proprietor. It does not seem to me that the analogy between policyholders and stockholders is sufficiently strong to extend to policyholders, by reason of such claimed analogy, rights which heretofore have been conceded to stockholders as such. While the assertion of the desire to confer with the other policyholders in order that after such conference an intelligent and concerted effort may be made to elect an efficient board of trustees is most persuasive and at first blush almost compels the granting of the motion for an inspection, yet it is the duty of the court to take into consideration the interests, not only of the 91 petitioners but of the 750,000 other policyholders, not here personally represented. If this order should be affirmed it would be impossible to confine the information for which petitioner asks to the mere names and addresses of policyholders. The card index kept by this company, not in obedience to any law, but for its own convenience, contains much information to which the petitioner is not entitled; and which very many policyholders would deeply resent being made public. It is a well-known peculiarity of human nature that many men regard their insurance matters as private and personal, and resent inquiries in regard thereto, and would be deeply offended if such matters were made known. The names of the beneficiaries, the amounts and terms of the policies, are entered on these cards. To have such information put in the hands of irresponsible outsiders would be regarded by men of such susceptibilities as an

outrage. In the absence of a law compelling it, we regard such an invasion of private rights as unwarranted.

The possession of the names and addresses of the 750,000 policyholders of this company might be a most valuable asset in unscrupulous hands. The solicitations these policyholders might be exposed to, the offers that might be made to them to exchange their policies for others, might result in great harm and loss to many innocent, inexperienced and easily influenced men. We are bound upon such an application, addressed to our discretion, to look at all sides of the question. A number of applications have been made for this information. If one policyholder is entitled to it, all are. The exclusive possession of this list by one policyholder or by a small group of policyholders might be exceedingly harmful. The court has no power, even under the common-law right of visitation and mandamus, to compel the sending of the information to all policyholders. It can, at the most., only allow inspection. The result of a general and continued demand to turn a force of outsiders into this company's office would be intolerable. Such an application in the past has, it appears, never been granted. It appears that some years ago the insurance department asked for this list; but upon the presentation of the considerations as to the nature of the relations between the company and the policyholders, the request was dropped and has never been renewed. We have been considering this application as having been made in good faith. There is much in the answering papers which would tend to throw doubt upon the motive of the moving parties. Not regarding that as controlling, we think that so long as no statute requires the keeping of such a list, so that the names and addresses can be readily taken without other information, such a mandamus as the one at bar ought not to be granted.

The discretion of the Special Term was improperly exercised; and the order must be reversed and the application for the writ denied, with fifty dollars costs and disbursements to the appellant.

INGRAHAM and LAUGHLIN, JJ., concurred; HOUGHTON, J., dissented.

Order reversed and application for writ denied, with costs to appellant.

App. Div.]

First Department, February, 1906.

MALCA WANDER, an Infant, by LEON ARENSEN, her Guardian  
ad Litem, Respondent, v. JOSEPH WANDER, Appellant.

First Department, February 9, 1906.

**Annulment of marriage — marriage annulled when wife is under age of legal consent — woman may sue under section 1743 of the Code of Civil Procedure — decree — short form not proper.**

An action by a woman to annul a marriage lies under section 1743 of the Code of Civil Procedure when the plaintiff had not at the time of marriage attained the age of legal consent set at eighteen years by the Domestic Relations Law, article 1, section 4. This is so although the parties have cohabited and the parents of the plaintiff consented to the marriage.

A woman is not compelled to bring her action under section 1742 of the Code of Civil Procedure.

In such action the short form of decision is not proper since the amendment to section 1022 of the Code of Civil Procedure made by Laws of 1903, chapter 85, and such short decision will be sent back for correction to conform it to the requirements of said section as amended.

APPEAL by the defendant, Joseph Wander, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 25th day of April, 1905, upon the decision of the court, rendered after a trial at the New York Special Term, annulling the marriage of the plaintiff and the defendant.

*Louis B. Boudin*, of counsel [*Boudin & Liebman*, attorneys], for the appellant.

*J. Philip Berg*, of counsel [*David Sternlicht*, attorney], for the respondent.

CLARKE, J. :

The plaintiff, by her guardian *ad litem*, brings this action to procure a decree annulling her marriage with the defendant. The complaint alleges, and the proof satisfactorily establishes, that she was born on the 18th day of February, 1888. A ceremonial marriage took place on the 16th day of August, 1903, in the presence of her family and about 300 invited guests. She was at that time fifteen years of age. The plaintiff and defendant ceased to live together in the latter part of November, 1903. She brings her

action under section 1743 of the Code of Civil Procedure which provides that "an action may also be maintained to procure a judgment declaring a marriage contract void, and annulling the marriage for either of the following causes existing at the time of the marriage: 1. That one or both of the parties had not attained the age of legal consent." The Domestic Relations Law (Laws of 1896, chap. 272) provides in article 1, under the heading "Unlawful Marriages," in section 4 that "a marriage is void from the time its nullity is declared by a court of competent jurisdiction if either party thereto \* \* \* is under the age of legal consent, which is eighteen years. \* \* \* Actions to annul a void or voidable marriage may be brought only as provided in the Code of Civil Procedure." The learned counsel for the defendant contends that section 1743 of the Code does not apply; that the action by the woman must be brought under section 1742 of the Code; and that as this marriage did take place with "the consent of her father, mother, guardian or other person having the legal charge of her person" and was "followed by consummation or cohabitation" it was not unlawful or voidable and that she is not entitled to a decree of annulment. In brief, that no action by the wife lies, merely because the marriage took place before she arrived at the age of legal consent. This precise question was before this court in *Conte v. Conte* (82 App. Div. 335). Mr. Justice LAUGHLIN, writing the opinion of an unanimous court, upon a careful examination of the various provisions of law affecting the question of actions for the annulment of the marriage, reached the conclusion that section 1743 of the Code did apply, and that such an action was maintainable. This decision was followed by the learned Appellate Division in the fourth department in *Earl v. Earl* (96 App. Div. 639). We have again considered the matter, and find no reason to depart from the views laid down. We, therefore, would affirm this judgment were it not for a technical defect.

The learned trial justice signed a decision in the form known as the short form of decision, permitted before the amendment of section 1022 of the Code made by chapter 85 of the Laws of 1903.\* That section now provides: "The decision of the court, or the report of a referee, upon the trial of the whole issues of fact, must

---

\* See Laws of 1895, chap. 946, amdg. Code Civ. Proc. § 1022.—REP.



App. Div.]

First Department, February, 1906.

state separately the facts found, and the conclusions of law, and direct the judgment to be entered thereon, which decision so filed shall form part of the judgment roll." "The power to formulate the decision upon the issues, and upon which the judgment must be entered, rests exclusively with the trial tribunal." (*Cutter v. Gulebrod Brothers Co.*, 168 N. Y. 512.)

The judgment must be vacated. "The trial court may then make and file a decision disposing of the issues and directing the proper judgment in accordance with the provisions of section 1022 of the Code of Civil Procedure." (*Electric Boat Co. v. Howey*, 96 App. Div. 410.)

The judgment should be reversed, and matter remitted to the trial justice to make and file a decision in accordance with section 1022 of the Code, without costs to either party.

O'BRIEN, P. J., INGRAHAM, LAUGHLIN and HOUGHTON, JJ., concurred.

Judgment reversed and matter remitted to the trial justice as directed in opinion, without costs.

---

RALPH RAYMOND, Respondent, v. THE SECURITY TRUST AND LIFE INSURANCE COMPANY and Others, Appellants; Impleaded with ALBERT B. OVITT, as Receiver of the AMERICAN UNION LIFE INSURANCE COMPANY, Respondent.

First Department, February 9, 1906.

**Life insurance corporation — when sale of assets to other corporation valid — when Superintendent of Insurance not personally liable for allowing substitution of bonds deposited in his department.**

While a hopelessly insolvent corporation must wind up its affairs in the manner prescribed by law, and while corporations doing a profitable business owe a duty to the public to continue their functions, nevertheless a life insurance company not insolvent in a commercial or insurance sense, when doing a losing business and unable to continue without further loss, may, by a contract made in good faith for the best interests of its creditors and stockholders, sell out its business to another corporation and cease operations.

Although after a sale of the corporate business under such circumstances certain small sums due employees stand unpaid through inadvertence, the fact

does not warrant a decree setting aside said agreement turning over the assets in an action by an employee whose claim has in fact been paid.

In the absence of evidence of bad faith, the State Superintendent of Insurance is not personally liable for the difference in value between United States bonds which he allowed to be withdrawn from deposit in his department, and the value of other bonds substituted therefor, if the value of the latter is \$100,000, for the law only requires that bonds of said value be on deposit in said department.

APPEAL by the defendants, The Security Trust and Life Insurance Company and others, from a judgment of the Supreme Court in favor of the plaintiff and the defendant Ovitt, entered in the office of the clerk of the county of New York on the 9th day of March, 1905, upon the decision of the court rendered after a trial at the New York Special Term.

*Edmund L. Mooney*, for the insurance companies, appellants.

*Julius M. Mayer*, Attorney-General, for the appellant Hendricks, as Superintendent of Insurance.

*Bert Hanson*, for the respondents.

HOUGHTON, J. :

For several years prior to February 18, 1901, the appellant, the American Union Life Insurance Company, a domestic corporation, had been carrying on the business of life insurance, and had then outstanding insurance to the amount of about \$9,000,000. For some time it had been doing a losing business, but it was not insolvent either in a commercial or in an insurance sense. It had, however, been notified by the insurance department of the State to write no new risks. On that day it entered into an agreement with the appellant, the Security Trust and Life Insurance Company, a foreign corporation engaged in the same business, having a right to do business in this State, whereby the latter company, in consideration of the transfer to it of practically all of the assets of the American Union Company, amounting to upwards of \$200,000, including the \$100,000 required by law to be on deposit with the State Superintendent of Insurance, agreed to pay all policies then matured by death, and to reinsure all living policyholders of the company, and to assume agency renewal contracts and rent of the office of the company. This agreement was entered into in pursuance of a

recommendation by the executive committee of the American Union Company, ratified at a special meeting of its stockholders.

The executive committee had conferred with the State insurance department with respect to reinsuring its policyholders, and it attempted to find other companies willing to reinsure them, but had not succeeded, until it made final arrangements with the appellant, the Security Company, with which they were advised they had the right to so contract. The arrangement appears to have been entered into in good faith to save the company from liquidation, and to protect its matured policies and existing policyholders.

The American Union Company supposed that it had paid all of its outstanding debts, but it transpired that small sums due to medical examiners, agents and attorneys scattered throughout the country had been overlooked.

After such agreement was entered into the plaintiff obtained judgment against the American Union Company on claims of this character, and upon execution being issued and returned unsatisfied, brought an action of sequestration against the American Union Company which resulted, on the 10th day of January, 1903, in a judgment to that effect and the appointment of respondent Ovitt as receiver. Thereupon the plaintiff instituted this action in behalf of himself and all other creditors and stockholders of the corporation who might choose to come in and make themselves parties. The relief sought in the action was the setting aside of the agreement entered into by the two companies, the turning over the property which had been transferred to the Security Company to the receiver, including the \$100,000 on deposit with the State Superintendent of Insurance, subject to the rights of existing policyholders therein. Hendricks as State Superintendent of Insurance was made a party, and it was asked that he account for the difference between the value of the United States bonds deposited with him and New York city bonds which he permitted to be substituted therefor, each being proper securities to deposit. The receiver made himself a party to the action, but no stockholder or creditor did so.

The plaintiff's judgment has been paid, together with his costs in the action; but the trial court permitted the action to be prosecuted,

in behalf of the receiver, and the trial resulted in a judgment setting aside the agreement between the two companies, and directing that all of the property transferred to the Security Company, including the \$100,000 on deposit with the State Superintendent of Insurance, after the rights of policyholders therein shall have been adjusted, be turned over to the receiver, and that the State Superintendent of Insurance personally pay to such receiver the difference in value between United States bonds which he permitted to be withdrawn from deposit with him and the bonds of the city of New York which he permitted to be substituted therefor.

The judgment against the Superintendent of Insurance personally was wrong, and, in any event, must be reversed. All that the law requires is that he shall compel life insurance companies to keep on deposit with him securities of the value of \$100,000. (See Ina. Law [Laws of 1892, chap. 690], § 71.) This he has done. No bad faith was established, and he complied with the law and cannot be compelled to pay any difference in value there may have been between the securities deposited with him and those substituted therefor, when the latter met the requirements of law with respect to being \$100,000 in value.

And we think, also, that the agreement between the two insurance companies was valid and should not have been set aside.

The respondents rely to sustain their judgment upon *People v. Ballard* (134 N. Y. 269), decided by the Second Division of the Court of Appeals (on a motion for the reargument of which [136 N. Y. 639] the First Division declined to pass upon the question whether or not it was inconsistent with the decision of the same court, made in the same month, in *Skinner v. Smith* [134 N. Y. 240] enunciating an apparently exactly opposite doctrine); *Cole v. M. I. Co.* (133 N. Y. 164); *Hurd v. N. Y. & C. Steam Laundry Co.* (167 id. 89); *Gilbert v. Finch* (72 App. Div. 38; affd., 173 N. Y. 455); *Jacobus v. Diamond Soda Water Mfg. Co.* (94 App. Div. 366), and kindred cases, holding that a hopelessly insolvent corporation cannot wind up its affairs by agreement, but must pursue the course pointed out by the statute, and that an unquestionably solvent corporation cannot bargain away its powers and life, but owes some duty to the public to continue to exercise the functions with which the State has endowed it.

An analysis of the authorities would disclose the fact that many of them turn upon whether or not the contract made was good as against an objecting creditor or a non-assenting stockholder, or whether it was improvident and not for the best interests of all concerned in the affairs of the corporation. A lengthy review of the decisions and a discussion of the distinctions which we deem to exist amongst them would be unprofitable and is unnecessary in view of the fact that we are of opinion that the true distinction between a valid and an invalid contract made by one corporation for the turning over of its assets and business to another is pointed out in *Jameson v. Hartford Fire Ins. Co.* (14 App. Div. 380), decided by this court.

In that case the rule that a hopelessly insolvent corporation must wind up its affairs in the manner prescribed by law, and the other rule that a corporation doing a profitable and paying business owes some duty to the public to continue to exercise the functions conferred upon it, are both recognized; but another rule is declared to exist, not in conflict with either of the others, and that is, that where a corporation is not insolvent, but is doing a losing business and unable to continue without further loss, it has the right to sell out its business to another corporation and to cease operations, and that a contract to that effect, made in good faith and for the best interests of creditors and stockholders, is valid and binding.

This rule is founded not only upon reason, but upon sound business sense, and the contract under consideration comes directly within it. The contract was made in good faith, and all the creditors were supposed to have been provided for. It was assumed that it was for the best interests of the existing policyholders that they should be reinsured in some proper company, and it is difficult to see why such was not the fact. Upon the winding up of the company and distribution of its assets, very little would have been realized by them.

It is true that a policyholder could not be compelled to relinquish the old company from liability and to accept reinsurance in the new (*People v. Empire Mutual Life Ins. Co.*, 92 N. Y. 105); but the subrogated company would be liable to him if he saw fit to enforce the contract. (*Fischer v. Hope Mutual Life Ins. Co.*, 69 id. 161.)

Section 22 of the Insurance Law (Laws of 1892, chap. 690) per-

mits reinsurance of "the whole or any part of any policy obligation in any other insurance corporation." It is said, however, that this provision of the statute does not permit an insurance company to reinsure its policy obligations as a whole. Whether it does or not, no policyholder has made himself a party to this action and objected, nor has any individual creditor done so. The receiver is not the representative of possible individual complaints or grievances.

The unintentional omission to provide for certain scattered creditors who can be, and undoubtedly will be, paid as fast as their claims are presented, was not sufficient to make the agreement void as matter of law. If any individual or creditor shall attack the transaction, it will be time enough then to determine whether or not the agreement was good or bad as to him.

The judgment should be reversed and a new trial granted, with costs to appellants to abide the event.

O'BRIEN, P. J., INGRAHAM, McLAUGHLIN and LAUGHLIN, JJ., concurred.

Judgment reversed, new trial granted, costs to appellants to abide event.

---

SAMUEL W. EHRICH, Respondent, v. HUGH J. GRANT, Appellant,  
Impleaded with ADRIAN H. MULLER, Defendant.

First Department, February 9, 1906.

**Injunction to restrain sale of collateral security — when remedy at law adequate — complaint — failure to show irreparable damage and that remedy at law is inadequate.**

The plaintiff, a promoter of a mining syndicate, pledged to the defendant certain subscription rights, valued at a premium, as security for a note given to defendant for sums advanced by him to buy said subscription rights for the plaintiff. In an action to restrain the defendant from selling said pledged subscription rights on a default in payment of the note, it was alleged that the defendant had agreed to carry the plaintiff's subscription rights until their value could be ascertained on the winding up of the syndicate; that the value of said rights could not now be ascertained, and that a sale thereof would cause irreparable damage to the plaintiff, and that he had no adequate remedy at law.

App. Div.]

First Department, February, 1906.

*Held*, that in the absence of allegations that the defendant was unable to meet any damage caused by said sale, the plaintiff's remedy at law was adequate, because there was a market price for the subscription rights, they having been bought and sold, and that a temporary injunction restraining the sale of the securities should be vacated;

That said allegations of irreparable damage were mere conclusions of law.

APPEAL by the defendant, Hugh J. Grant, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 14th day of November, 1905, continuing during the pendency of the action a temporary injunction theretofore granted.

*John M. Bowers*, for the appellant.

*Abraham Benedict*, for the respondent.

HOUGHTON, J. :

In the year 1902 the plaintiff was engaged in financing certain Nevada mining properties and brought about the formation of what was called the De Lamar Gold Mining Syndicate. The operations were so successful that subscription rights sold above par, and the premium on such sales as plaintiff brought about belonged to him.

While such subscriptions were thus commanding a premium, plaintiff avers that he permitted the defendant Grant to become a subscriber to the syndicate to the extent of \$50,000 without premium, on the agreement that Grant should carry for plaintiff a subscription to the extent of \$25,000 and pay such sums as might from time to time be demanded thereon, which sums plaintiff was not to repay until the winding up of such syndicate operations, when profits were to be applied as far as they would go, and if there should remain any balance that sum only to be paid by plaintiff. In furtherance of this agreement, as plaintiff claims, he gave to Grant, on the 3d of July, 1902, his demand note for \$22,500, and pledged as collateral security for the payment thereof this right of participation in the De Lamar syndicate, with right to sell the same on failure to pay the note. Defendant Grant advanced the whole sum to the syndicate, and in October, 1905, demanded payment of the note and gave notice that he would sell the collateral on a certain day in default of payment.

Thereupon the plaintiff brought this action in equity, asking that

his rights under the agreement be adjudged, and that Grant be permanently and perpetually restrained from selling such collateral security, alleging that it is of great value, but so uncertain and so dependent upon the success of the mining operations that it cannot be measured in money, and that its sale would irreparably damage him and that he has no adequate remedy at law.

The averments of the complaint that the plaintiff would be irreparably damaged by the sale and that he has no adequate remedy at law are mere conclusions of law and are not supported by the facts alleged.

There is no intimation that Grant is not entirely able to pay to the plaintiff any damages which he may sustain by reason of the sale of the collateral if plaintiff shall finally succeed in establishing that Grant under his agreement has no right to make such sale.

The record shows that the participating rights are actually bought and sold, and on the argument it was conceded that they have recently brought a higher premium than they commanded in 1902, when the negotiations between plaintiff and defendant were had. When the syndicate is wound up it could be determined just what the right of the plaintiff to participate would realize, and then certainly there would be no difficulty in determining precisely what damage the plaintiff had sustained by any unauthorized sale of his participating right. This court has held in *Butler v. Wright* (103 App. Div. 463) and *Clements v. Sherwood-Dunn* (108 id. 327) that the simple fact that a stock is not listed and sold, or offered for sale, so that a market value may be readily established, does not warrant the interposition of equity to decree specific performance where the value of the stock or right can be ascertained from other facts and the damage thus established.

The principle laid down in those cases is applicable to the present one. The injunction order granted, and which was continued by the order appealed from, is based upon the theory that the plaintiff would be irreparably damaged by a sale of the collateral. The defendant being responsible and able to respond in any damage which the plaintiff may establish, if he shall be able to establish any, and the collateral having a value which can be ascertained by proof of the value of the properties embraced within the syndicate agreement, as well as the price at which the rights to participate



App. Div.]

Third Department, January, 1906.

have sold, there is no occasion for invoking equitable principles, or for restraining defendant from doing what he presumptively has the right to do, and the injunction should not have been granted.

On the facts appearing in the record before us it is very doubtful whether Morgenthau was the agent of Grant to such extent as that Grant was bound by any agreement made by him with plaintiff, and also whether the note was made and delivered by the plaintiff under such conditions as permit him to prove any oral agreement concerning it. But we having concluded that the injunction was improperly granted, and its propriety being the only question before us, a consideration of these questions becomes unnecessary.

The order should be reversed, with ten dollars costs and disbursements, and the motion to continue the injunction denied, with ten dollars costs.

O'BRIEN, P. J., INGRAHAM, LAUGHLIN and CLARKE, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

---

THE CITY OF ELMIRA, Plaintiff, v. EDMUND SEYMOUR and ROBERT A. GUNN, Defendants.

Third Department, January 8, 1906.

**Constitutional law** — when local bill not unconstitutional in embracing subject not expressed in title.

Chapter 476 of the Laws of 1905, entitled "An act to authorize the city of Elmira to issue its bonds for the construction of a bridge or the reconstructing and repairing of an existing bridge across the Chemung river in the city of Elmira," is not in violation of section 16 of article 3 of the State Constitution in embracing more than one subject, although it authorizes the issue of bonds for said purposes.

In order to be constitutional it is not necessary that the title of a bill shall be the best that could be selected, nor is it necessary to set forth in the title the various details of the object or purpose to be accomplished by the bill; it is sufficient if the title properly expresses the general purpose of the bill so as to apprise the public of the interests affected thereby.

**SUBMISSION** of a controversy upon an agreed statement of facts, pursuant to section 1279 of the Code of Civil Procedure.

The plaintiff is a municipal corporation organized under special charter, viz., chapter 615 of the Laws of 1894, and the acts amendatory thereof.

On the 17th day of May, 1905, the Legislatura of this State passed chapter 476 of the laws of that year, entitled "An act to authorize the city of Elmira to issue its bonds for the construction of a bridge or the reconstructing and repairing of an existing bridge across the Chemung river in the city of Elmira." Such act authorized and directed the common council of said city to issue, upon written demand of the board of commissioners therein provided for, the bonds of said city in a sum not exceeding \$55,000, the moneys arising therefrom to be disbursed upon the orders of said board of commissioners. Commissioners were by such act appointed, and the constitution of such board was therein provided for, and the board was therein authorized to expend the moneys realized from the sale of such bonds to build or repair a bridge across the Chemung river in said city from Lake street to Pennsylvania avenue. Said board determined to repair the bridge at such site, and demanded of the common council that they issue the bonds of said city in the sum of \$55,000, as provided in said act. The common council thereupon directed the issuance and execution of such bonds, and further directed the city clerk to advertise for bids for the purchase of the same. The defendants, as copartners composing the firm of Edmund Seymour & Co., doing business in the city of New York, in response to such advertisement by the city clerk, on August 7, 1905, submitted a proposal accompanied by a deposit of \$1,500 as an evidence of good faith, in which they offered to purchase said bonds, if they should be found in all respects legal. Such bid was accepted by the plaintiff and thereafter said bonds were issued and tendered to the defendants who refused to accept or pay for the same, on the sole ground that the said act authorizing their issue is unconstitutional and void in that it is in conflict with section 16 of article 3 of the State Constitution, and the bonds are, therefore, illegal.

*Richard H. Thurston*, for the plaintiff.

*William Morgan Lee*, for the defendants.

App. Div.]

Third Department, January, 1906.

PARKER, P. J. :

The defendants in this proceeding having bid 106 for the \$55,000 of bonds issued by the plaintiff under the act in question, and such bid having been accepted by the plaintiff, a contract arose between such parties; and the defendants are liable to forfeit the \$1,500 put up by them as damages for a breach of such contract, provided they now refuse to proceed therewith, unless they are able to establish some good reason for such refusal.

The only ground that the defendants offer as an excuse for such refusal is that the act under which the plaintiff claims to issue such bonds is in violation of section 16 of article 3 of the State Constitution, and such is the only question that, under this record, is presented for our decision.

Section 16 of article 3 of our State Constitution provides as follows: "No private or local bill which may be passed by the Legislature shall embrace more than one subject, and that shall be expressed in the title." The title of the bill in question reads as follows: "An act to authorize the city of Elmira to issue its bonds for the construction of a bridge or the reconstructing and repairing of an existing bridge across the Chemung river in the city of Elmira."

The defendants claim that this act is violative of this provision of the Constitution, and that, therefore, the bonds are issued without authority.

It was some time ago agreed that the courts are unable to formulate any general rule that will solve all the cases coming under this section. Each case seems to depend generally upon its own peculiar provisions. (*Van Brunt v. Town of Flatbush*, 128 N. Y. 50, 54.) It is said in *People ex rel. Burroughs v. Brinkerhoff* (68 N. Y. 265) that whenever such an act and the title meet the purpose of the constitutional inhibition, the act is valid. And in *People ex rel. Corscadden v. Howe* (177 N. Y. 499, 504) it is said that the object of the constitutional requirement was to "advise the public in general, and members of the Legislature in particular, by the title of the bill what interests are likely to be affected by its becoming a law."

\* \* \* The general rule to be deduced from them (viz., the many decisions on the subject) is that it is not necessary that the title of the bill should be the best that could be selected, nor is it necessary

to set forth in the title the various details of the object or purpose to be accomplished by the bill ; it is sufficient if the title fairly expresses the general purpose of the bill ; but at the same time the title must be such as to reasonably apprise the public of the interests that are or may be affected by the statute."

It seems to me clear that the act in question fully meets all the requirements here laid down. The purpose of the act is plain. It is suggested that there are two subjects contained in the act, the one to issue bonds and the other to authorize the building or repair of a bridge ; and that hence being a local bill, it violates the Constitution. But there are not two independent subjects provided for in this act. Evidently but one subject is intended, and that is that the Lake street bridge is to be rebuilt or repaired and the expense thereof is to be paid for by the issue of city bonds. And the title of the act will deceive no one. A fair interpretation of such title manifestly suggests the very purpose for which the act is intended ; no one can be misled by it. No one would naturally suppose that bonds were to be issued for the building of a bridge and yet no bridge be built, and if it might fairly be supposed that the bridge was to be built the provisions for building it and methods for raising money on the bonds might fairly be expected to be found in the act. It all seems germane to the one act and for this reason I conclude that the bonds are valid bonds and the contract of the parties hereto concerning them should be performed.

All concurred ; SMITH, J., not sitting.

Judgment for plaintiff as per opinion, with costs.

---

FRED E. SHAW, Respondent, v. FRANK B. COOKE, Appellant.

Third Department, January 8, 1906.

**Chattel mortgage — when not paid by delivery of defective real mortgage in lieu thereof.**

When a chattel mortgage executed by the plaintiff provides that he is to assign to the mortgagee a mortgage on certain real estate in lieu of the chattel mortgage, and the real estate mortgage subsequently assigned does not cover all the premises specified, and when on the discovery of said defect in the latter

App. Div.]

Third Department, January, 1906.

mortgage the chattel mortgagor agrees to pay the balance unpaid by the foreclosure of the same and said chattel mortgage is not redelivered to the mortgagor, the real estate mortgage is not substituted for the chattel mortgage and the same is still a lien upon the personal property and may be foreclosed by the mortgagee.

APPEAL by the defendant, Frank B. Cooke, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Chenango on the 17th day of February, 1905, upon the decision of the court rendered after a trial at an adjourned term of the Chenango Special Term.

On November 11, 1902, plaintiff, being about to engage in the livery business, purchased of B. V. & T. A. Jewell, of Mt. Upton, Chenango county, N. Y., certain horses, wagons, harness, robes, blankets and a fur coat. In consideration thereof plaintiff gave to the said Jewells his promissory note for \$800 and also a chattel mortgage upon said property, which contained the following clause: "And this mortgage is on the express condition that if the said Fred E. Shaw shall pay to the said B. V. & T. A. Jewell the sum of \$800.00 with interest thereon as follows, viz.: Shall deliver to the said B. V. & T. A. Jewell a first mortgage on 14 acres of land and creamery, known as the Culver property, and a mortgage on a farm of 200 acres known by the same name, and there is to be not to exceed \$1,500.00 encumbrance on the said 200 acres except the mortgage to be delivered to said Jewells. Said mortgage is for the sum of \$800 and accrued interest, which the said Fred E. Shaw hereby agrees to pay, then this transfer to be void and of no effect." Thereafter, on November twenty-eighth, plaintiff assigned to the said Jewells a certain bond and mortgage, made by Charles A. Culver and wife to Olney A. Gifford, upon real estate as set forth in the clause of the chattel mortgage specified, in which there was covenanted to be due and owing the sum of \$800. The mortgage was not a lien upon the 200 acres therein described because the lien thereof had been divested under a foreclosure sale of a prior mortgage, and there was no creamery standing upon the fourteen-acre piece at the time of the sale. It is not claimed, however, that these facts were known to Shaw, this plaintiff, or that there was any fraud upon his part. There was in the assignment of the mortgage no agreement on Shaw's part to pay the same. On the same

day said Jewells, by written instruments, assigned the said real property mortgage and the said chattel mortgage and transferred the \$800 note to this defendant in consideration of \$700. Thereafter this defendant foreclosed the real estate mortgage, upon which foreclosure he received, exclusive of costs, a little over \$200. He then seized and sold the property covered by the chattel mortgage.

Plaintiff has brought this action asking for relief that the defendant account to the plaintiff for the full and true value of the chattel mortgaged property so taken and sold by him and that the said chattel mortgage be decreed to have been fully paid before said sale "and that if there was any sum or part thereof unpaid at the time of said sale that the value of said property so to be ascertained or so much thereof as may be necessary to be applied in payment and extinguishment of said debt secured by said mortgage so given to B. V. & T. A. Jewell, if any there be, that the amount remaining due on said mortgage be ascertained, if any; that it be adjudged that this plaintiff may redeem on payment of such amount; that the plaintiff herein have judgment against said defendant for the balance, together with such other and further relief in the premises as may be just and equitable, with the costs of this action." In the answer, after certain admissions and denials, the giving of the note and the chattel mortgage and the real estate mortgage by the plaintiff are alleged and their transfer to the defendant for the sum of \$700, the foreclosure of the Culver mortgage, the sale under the chattel mortgage for the sum of \$387.51, and that there remained, after said sale under the chattel mortgage, due upon the plaintiff's obligation the sum of \$124.62. That upon the foreclosure of the real estate mortgage there was received the sum of \$221.09, which leaves due upon the plaintiff's obligations the sum of \$214.22. Judgment is demanded for such sum as a counterclaim. The action was moved for a trial at a Special Term before a single justice. The trial judge found that the personal property was transferred by said Jewells to the plaintiff in consideration of the mortgage upon the Culver farm aforesaid and that the note and chattel mortgage were as security for the transfer of said mortgage; that while the said mortgage did not answer the exact description in the chattel mortgage, nevertheless, it having been tendered and received, constituted full payment and satisfaction thereof, and that the plaintiff was

App. Div.]

Third Department, January, 1906.

entitled to recover from the defendant the value of the chattels taken under the chattel mortgage as having been wrongfully taken. For that value, to wit, the sum of \$425, judgment was ordered, with costs against the defendant. From the judgment entered upon this decision the defendant has appealed.

*A. R. Gibbs* and *Wood D. Van Derwerken*, for the appellant.

*Hubert C. Stratton* and *Irving J. Tillman*, for the respondent.

PER CURIAM:

When the Culver mortgage was delivered to Jewell, the chattel mortgage was not surrendered. The fact that the Culver mortgage was an actual lien upon less land than was understood and was, therefore, of less value did not come to the knowledge of the defendant, as the assignee of Jewell, until about the time of the foreclosure. Upon his representation of that fact to the plaintiff the plaintiff recognized the chattel mortgage as an existing liability and agreed to pay the balance thereof, over and above the proceeds of the Culver mortgage, and requested the foreclosure of the Culver mortgage. Under such circumstances it is wholly unnecessary to return the Culver mortgage. Upon the evidence we are of opinion that the Culver mortgage was not in fact substituted by the parties for the chattel mortgage, and, therefore, that the chattel mortgage was still a lien upon the property purchased by the plaintiff.

The judgment should, therefore, be reversed upon the law and facts and a new trial granted, with costs to appellant to abide event.

All concurred.

Judgment reversed on law and facts and new trial granted, with costs to appellant to abide event.

**JAMES CLARENCE SINCLAIR, Appellant, v. CECIL CAMPBELL HIGGINS,  
Respondent.**

Second Department, January 26, 1906.

**Conversion — when complaint states cause of action for conversion — when question as to whether moneys were turned over for investment or as loan is for the jury — when written evidence not conclusive.**

A complaint which alleges in substance that the defendant, acting as plaintiff's attorney, induced him to turn over moneys on a promise to invest the same in a water company in which the defendant was interested, which representations were false, etc., and that the defendant did not so invest said moneys but converted the same to his own use, can be regarded as stating a cause of action for conversion and not for false and fraudulent representations.

If there is some evidence of such promise to invest the moneys, it is error to dismiss the complaint on the ground that the moneys were loaned to the defendant. It is a question for the jury as to whether the moneys were turned over for investment or as a loan.

Papers introduced in evidence and in form evidencing a loan are not conclusive.

APPEAL by the plaintiff, James Clarence Sinclair, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 13th day of January, 1905, upon the dismissal of the complaint by direction of the court after a trial at the Kings County Trial Term; also from an order entered in said clerk's office on the 11th day of January, 1905, denying the plaintiff's motion for a new trial, and also from an order entered in said clerk's office on the 28th day of January, 1905, granting the defendant an extra allowance of costs.

The complaint in this action provides as follows:

"I. At all the times hereinafter mentioned, defendant was and now is, an attorney and counsellor at law of the State of New York, with an office at Nos. 63 and 65 Wall street, in the City of New York, Manhattan Borough.

"II. In September, 1900, and for several months prior thereto, defendant was the legal adviser of plaintiff, and undertook to and did advise plaintiff in respect of the investment of plaintiff's moneys.

"III. In September, 1900, plaintiff was only 26 years of age, and defendant more than 40 years of age.

"IV. In September, 1900, defendant, while acting in the capac-



App. Div.]

Second Department, January, 1906.

ity of attorney and legal adviser of plaintiff, falsely and fraudulently represented to plaintiff that he was interested in and about to acquire control of a large water company in the County of Westchester, in the City of New York, in the State of New York, and in order to procure from plaintiff the sum of Ten Thousand (\$10,000.00) Dollars more particularly referred to hereafter, falsely and fraudulently represented, promised and agreed that upon the delivery of said sum of Ten Thousand (\$10,000.00) Dollars by plaintiff to defendant, defendant would immediately invest the said Ten Thousand (\$10,000.00) Dollars in said water company and obtain control thereof for the benefit and profit of plaintiff.

"V. In sole reliance upon said promise, representation and agreement as aforesaid, plaintiff delivered to defendant the sum of Ten Thousand (\$10,000.00) Dollars by check, of which the following is a true and correct copy: \* \* \*

"VI. Defendant at the time of the making of said representations, promises and agreements, and at the time of the procurement of said moneys, was not interested in any water company in the County of Westchester, in the City and State of New York, or elsewhere, nor was the defendant about to acquire control of a water company in the County of Westchester in the City and State of New York or elsewhere, nor did the defendant invest said Ten Thousand (\$10,000) Dollars in said water company or in any other matter, but fraudulently converted the said Ten Thousand Dollars to his own use.

"VII. At various times between September, 1900, and the commencement of this action, plaintiff demanded the return of said Ten Thousand Dollars, but defendant at all times refused to return said Ten Thousand Dollars, falsely and fraudulently representing to plaintiff that he had invested said Ten Thousand Dollars in the manner represented, promised and agreed to by him, and in order to deceive plaintiff and prevent him from enforcing his legal remedies in respect of the said Ten Thousand Dollars fraudulently delivered to plaintiff a series of promissory notes each in the sum of Twenty Thousand Dollars indorsed by one Louis B. Jennings, conspiring with defendant to unlawfully obtain said Ten Thousand Dollars from plaintiff. \* \* \*

"VIII. As pretended security for the return of said Ten Thou-

said Dollars defendant delivered to plaintiff first mortgage 5% gold bonds \* \* \* in Tinten Manor Water Company of the pretended value of \$10,000.00.

"Upon information and belief, Tinten Manor Water Company is absolutely and in all respects insolvent, and the said bonds are and each of them is in all respects valueless, and defendant well knew at the time of the delivery of said bonds to plaintiff, that said bonds were and each of them was of no value. \* \* \*

"IX. Defendant at the time of said representations and procurement of said moneys, was and now is, absolutely and in all respects insolvent. The following is a true and correct copy of the judgment docketed against defendant in the office of the Clerk of the County of New York, City of New York. \* \* \*

"X. Defendant well knew at the time he made said representations, promises and agreements that he did not intend to return said \$10,000.00 and did not intend to invest \$10,000.00 in said water company or elsewhere, but defendant procured said \$10,000.00 for the purpose of converting same to his own use.

"XI. Plaintiff relied upon said representations made by defendant as aforesaid, and believed them to be true, and except for said representations would not have delivered said Ten Thousand Dollars to defendant.

"Wherefore, plaintiff demands judgment against defendant for the sum of Ten Thousand Dollars, with interest. \* \* \*"

*I. R. Oeland* [*S. S. Myers* with him on the brief], for the appellant.

*Frank E. Blackwell*, for the respondent.

**PER CURIAM:**

If the action is capable of being regarded only as a suit to recover damages for false and fraudulent representations, the reasons given by the learned trial judge in support of his disposition of the case might be deemed satisfactory. It seems to us, however, that it may fairly be viewed as an action for conversion, based on the alleged promise of the defendant to invest the plaintiff's \$10,000 for him in a water company, his acknowledged failure to do so, and his retention of the money to his own use. Certainly there is some evidence

App. Div.]

First Department, January, 1906.

of such a promise; the defendant admits that he did not invest the money for the plaintiff at all; and his assertion that it was a loan is an implication, if any further evidence than his failure to return it were needed, that he has applied the money to his own purposes. We think there was a question for the jury and that the complaint should not have been dismissed. The judge was not authorized to decide as matter of fact that the transaction was in reality a loan, in view of the plaintiff's testimony tending to show that such was not its true character; the circumstance that the form of the papers indicated a loan was not conclusive.

The plaintiff appears to have fared rather hardly in this litigation. He has parted with \$10,000, without receiving any value for it, to a stranger who makes no substantial excuse or apology for not repaying the money and who has succeeded in imposing a penalty of \$250 upon the plaintiff in the shape of an additional allowance by way of costs for trying to get it back.

The judgment and both orders should be reversed.

Present — JENKS, HOOKER, RICH and MILLER, JJ.

Judgment and orders reversed and new trial granted, costs to abide the event.

---

JOHN M. BOWERS, as Receiver of the MERCANTILE CREDIT GUARANTEE COMPANY OF NEW YORK, Respondent, v. WILLIAM H. MALE, SIEGMUND J. BACH and Others, Appellants, Impleaded with JAMES W. HINCKLEY and JOHN FITZGERALD.

First Department, January 26, 1906.

**Corporation — liability of directors of credit insurance corporation for investing funds of said corporation in worthless stock of another corporation — when receiver of such corporation not estopped by action of stockholders authorizing such investment.**

**Action by the receiver of an insolvent credit insurance company against its directors personally to recover sums alleged to have been wasted by the defendants in the purchase of the worthless stock of another corporation under the control of said corporation.**

APP. DIV.—VOL. CXI. 14

The facts, in brief, were as follows:

The credit insurance corporation doing a losing business became unable to report the surplus required by the statutes of other States to entitle it to do business in such States. In order to satisfy the requirements as to said surplus, a plan was devised to reduce the capital stock which in said States was treated as a liability and to create a surplus to be made up by the conversion of a portion of its capital into surplus through the retirement and cancellation of an equal amount of stock, and by the raising of a further sum in cash. This plan was sanctioned by the stockholders at a regular meeting, at which the formation of a corporation was authorized, to be called the "Reserve Company," with a capital through which the surplus of the credit insurance company should be increased. The purchase of stock of said Reserve Company was authorized but it was provided by the stockholders that stock so purchased should not appear as an asset. The said Reserve Company was formed, but it was found impossible to dispose of any of its stock in open market, and the only asset of said company was an agreement made between the credit insurance company and one Smith, by which the latter was to pay the former \$30,000 for full-paid stock to be canceled on delivery and \$50,000 balance in installments, in consideration of which payments the insurance company agreed to pay Smith or his assigns \$1 for each \$1,000 of insurance in force on its books at certain periods. The said agreement further provided that said Smith, or his assigns, was only entitled to such payment in proportion to the sums advanced by him, and that a failure on his part to advance the sums should only operate to forfeit his right to said payment. This contract was assigned by Smith to the Reserve Company. Smith became the owner of the entire stock of the Reserve Company on the assignment of the contract, and the Reserve Company agreed to hold Smith harmless from all liability to the insurance company, and thereafter said insurance company did release said Smith from liability on said contract. Smith thereupon reassigned the capital stock of the Reserve Company to said company in consideration of its agreement to hold him harmless.

As said transactions did not enable the insurance company to report a sufficient surplus to do business in other States, the defendant directors subscribed for and bought \$30,000 worth of stock of the Reserve Company, borrowing the money to pay therefor. Thereafter the defendant directors authorized the purchase by the insurance company of the stock of the Reserve Company, which was carried out by the purchase of the stock held by the defendants. Other transactions of the same nature were carried out by the defendants as particularly set forth in the opinion.

*Held*, that the defendants were personally liable to the receiver of said insurance company for sums squandered in the purchase of said stock of said Reserve Company known by them to be worthless;

That said directors were not relieved from said personal liability by reason of the resolution of the stockholders of said insurance company authorizing the formation of said Reserve Company and the purchase of the stock thereof;

App. Div.]

First Department, January, 1906.

That said defendants were not relieved from personal liability by reason of a resolution of the stockholders of said insurance company ratifying the acts of said directors in purchasing said stock when said directors had control of said meeting by controlling the majority of the stock in person or by proxy.

HOUGHTON, J., dissented.

SEPARATE APPEALS by the defendant William H. Male and by the defendants Siegmund J. Bach and others from a judgment of the Supreme Court in favor of the plaintiff and against the said defendants, entered in the office of the clerk of the county of New York on the 14th day of January, 1904, upon the report of a referee, as amended by an order entered in said clerk's office on the 9th day of May, 1904, with notice of an intention on the part of the defendant William H. Male to bring up for review upon such appeal an order entered in said clerk's office on the 16th day of December, 1904, granting the plaintiff an extra allowance.

By the judgment appealed from the complaint was dismissed as to the defendants Hinckley and Fitzgerald, and from that portion of the judgment the appellants other than William H. Male do not appeal.

*William J. Curtis*, for the appellant Male.

*Charles A. Collin*, for the appellants Bach and others.

*George Zabriskie*, for the respondent.

Judgment affirmed, with costs, on the opinion of the referee; HOUGHTON, J., dissenting.

The following is the opinion of the referee :

ODELL, Referee :

The plaintiff sues as receiver of the Mercantile Credit Guarantee Company of New York. The defendants were directors of that company, and in the complaint they are charged with having, on or about the 27th of October, 1896, misapplied and wasted \$30,000 of the funds of the company in the purchase of 300 shares of the worthless stock of a corporation known as the Reserve Company, to the damage of the first-named company, its stockholders and creditors. In some respects the case is a peculiar one, and a statement of the facts at some length is necessary to an understand-

ing of the claim that is made and the grounds on which the defendants deny their liability.

The Mercantile Credit Guarantee Company was a New York corporation, organized in December, 1892, as a credit insurance company, or (as the president puts it) "a protection to a merchant against excessive and unlooked-for losses." It had a capital of \$250,000, all of which was paid in in cash within two years from its creation. It did business in other States than New York, and at the close of the year 1894 it had risks outstanding amounting to \$5,134,084, the premiums on which had amounted to \$165,450.64. By the authorities of Ohio the company was ranked as an insurance company, and was, therefore, required, as a condition of doing business in that State, to comply with the requirements of the Ohio Insurance Law and maintain a surplus or "reserve" equal to fifty per cent of the premiums for insurance in force at the end of each year when it made its annual report. Substantially the same demand was made by the authorities of other States. The Mercantile Company was not able to exhibit the required surplus at the close of 1894. The year had been a disastrous one. The company had paid losses amounting to upwards of \$166,000, and its surplus, as reported to the directors on January 10, 1895, was only \$10,834.07. The situation was a serious one, and the stockholders were called together on December 5, 1894, "to consider such matters as will be presented for their action," including a proposed reduction of the capital stock and a proposed increase of the company's surplus. At that meeting a plan was approved and adopted which provided for the following: *First.* The formation of a company to be called the "Reserve Company," with a cash capital of \$100,000, through or by means of which the surplus of the Mercantile Company should be increased by that amount. *Second.* The exchange by stockholders of the Mercantile Company of 500 shares, par value \$50,000, of its stock for 500 shares, par value \$50,000, of the stock of the Reserve Company. *Third.* The reduction of the capital stock of the Mercantile Company by 500 shares, the \$50,000 represented by said shares to "constitute a surplus applicable to the liabilities" of the company. *Fourth.* The acquisition by the Mercantile Company, through a contract with the Reserve Company, or other party, of the 500 shares of Mercantile Company's stock received by the Reserve Com-

App. Div.]

First Department, January, 1906.

pany in exchange for its own stock, and the cancellation of said shares, whereby the proposed reduction of the capital stock of the Mercantile Company would be accomplished. *Fifth.* A contract between the Mercantile Company and the Reserve Company or other parties "for the purpose of establishing a surplus fund for said (the Mercantile) company of one hundred thousand dollars on such terms as by the board of directors may be determined to be for best interests of this company." At the same meeting a resolution was adopted by which the board of directors were "authorized and instructed at their pleasure and whenever they deem it to be to the interest of the company to do so, to purchase or buy from any source obtainable stock of the Reserve Company of New York, at a price not above the par value of said stock, and the money used in the purchase of said stock shall be deducted from the reserve or surplus of this company over and above its capital, \* \* \* and the stock so purchased shall not appear as an asset of the company." To this resolution the defendants appeal as a justification or partial justification of their action in making the purchase of stock alleged in the complaint.

'Following this stockholders' meeting, and on the twenty-eighth of December, the "Reserve Company" was created, with a share capital of \$100,000, for the single purpose of furnishing the Mercantile Company with a reserve or surplus. It was organized by the Mercantile Company and was entirely under its control. On the 31st of December, 1894, an agreement was made between the Mercantile Company and William Bro Smith by which Smith agreed to pay to the company \$50,000 of its full paid stock (such stock to be canceled on delivery) and the sum of \$50,000 in cash in instalments on March first, July first and October first. In consideration of these payments the company agreed to pay to Smith or his assigns "the sum of one dollar for each one thousand dollars of insurance in force on the books of the said The Mercantile Credit Guarantee Company at its home office in New York on the first day of January, One thousand eight hundred and ninety-five, and on each succeeding first day of January during the continuance of this contract, such payments to be made in equal monthly instalments on the first day of each month in the year next succeeding the first day of January on which they are figured." Among other

provisions and stipulations of the said agreement was the following: "It is further mutually agreed that the said William Bro Smith, his executors, administrators or assigns, shall only be entitled to the proportion of the said one dollar per thousand hereinbefore specified to be paid as the amount paid shall bear to the said sum of one hundred thousand dollars, until the said one hundred thousand dollars shall be fully paid as hereinbefore specified, and a failure on the part of the said William Bro Smith, his executors, administrators or assigns, to pay said one hundred thousand dollars at the time and in the manner hereinbefore specified shall only operate to forfeit the right to said payment in said proportion." On the 10th of January, 1895, this agreement was assigned by Smith to the Reserve Company in consideration of the issuance to him of that company's entire capital stock, the Reserve Company undertaking to hold him harmless from all liability under or upon the said agreement and to procure for him from the Mercantile Company a full release from such liability. On the same day the Mercantile Company, by a written instrument, to which the Reserve Company and Smith were parties, did fully release Smith from such liability and accept the Reserve Company as the contracting party in his stead. Thereupon Smith transferred to the Reserve Company the whole of the stock which had been issued to him as the consideration for the assignment of the said agreement. On or about the twenty-eighth of January the stockholders of the Mercantile Company delivered to the Reserve Company twenty per cent (amounting to 500 shares) of their holdings of stock of the Mercantile Company and received therefor an equal number of shares of stock of the Reserve Company. The said 500 shares were then surrendered to the Mercantile Company in partial performance of the Smith agreement and were canceled. The results of these several transactions were that the stock of the Mercantile Company was reduced to \$200,000, its surplus or reserve was increased by \$50,000, and each of its stockholders became a stockholder of the Reserve Company.

The Mercantile Company was not yet in a condition to report a reserve sufficient to satisfy the requirements of Ohio and other States. The time to get together such a reserve was extended by Ohio and Illinois to July tenth. The Smith agreement provided



App. Div.]

First Department, January, 1906.

for the payment of \$17,000 on March first and of a like sum on July first. These payments had been assumed by the Reserve Company, but on July ninth neither had been made — the Reserve Company not having been able to dispose of any of its stock, except a single share, and so being utterly without means to further perform the said agreement. In this emergency the defendants Male, Deen, Bach, Herzig and Smith, who were stockholders and directors of the Mercantile Company and members of its executive committee, came to the company's rescue. They subscribed for or purchased at par 300 shares (\$30,000) of the stock of the Reserve Company and paid therefor with money borrowed for the purpose from the Phenix Bank. This sum was at once paid over to the Mercantile Company on account of the Bro Smith agreement, and made up the required reserve. No certificates were issued by the Reserve Company for the said 300 shares until about the ninth of September, and the \$30,000 was deposited in the Phenix Bank, and a certificate of deposit was given therefor to the Mercantile Company "Payable on the return of this certificate to the order of the officers of said company duly approved by three" of the five purchasers of said stock.

Satisfactory reports, showing the required reserve, having been made in Ohio and other States, action was taken by the directors of the Mercantile Company to relieve the five parties named above from the liability incurred by them in the purchase of the said 300 shares. On the 1st of August, 1895, at a directors' meeting at which Deen, Male, Herzig, Smith, Berry and Fitzgerald were present, a resolution was adopted authorizing and directing the officers of the company to purchase at a price not above par \$5,000 of the stock of the Reserve Company "in accordance with the authority and instructions given by the stockholders at their meeting of December 5th, 1894." At a meeting held on September fifth, at which Deen, Male, Bach, Smith, Fitzgerald and Berry were present, a similar resolution was adopted authorizing the purchase of \$10,000 of the said stock. At a meeting held on October third, at which Deen, Male, Herzig, Smith, Fitzgerald and Berry were present, a similar resolution was adopted authorizing the purchase of \$15,000 of the said stock. Purchases of Reserve Company stock were made pursuant to the said resolutions, and the stock purchased was the 300 shares subscribed for by Deen and his four associates.

At the close of the year 1895 the Mercantile Company found itself in the same condition as at the close of the preceding year, that is, unable to report a sufficient surplus to the States in the west. It had the 300 shares of Reserve stock, but at their meeting of December 5, 1894, the stockholders had, for a reason not explained, declared that any of that stock that might be purchased by the directors should "not appear as an asset of the company;" hence it was not available in computing a surplus. Therefore a sale of the stock was resorted to. The same five gentlemen who had subscribed for it in July now purchased it from the Mercantile Company, again borrowing the necessary moneys from the Phenix Bank, and the \$30,000 paid for it was, on December thirtieth, deposited in bank as before by the Mercantile Company, and a certificate of deposit was issued by the bank payable to the order of the company "approved by either three of the executive committee," which consisted of the five purchasers and the defendant Hinckley. Reports, showing a fifty per cent. premium reserve, were then made to Ohio and other States. In completion of the transaction the 300 shares, which seem to have then stood in the name of C. Vincent Smith, treasurer, were assigned to the several purchasers—to Male 100, and to Deen, Bach, Herzig and Smith 50 each—and certificates were issued to them therefor.

On February 5, 1896, a meeting of the directors was held, at which Deen, Bach, Herzig, Berry and Smith were present, and a resolution was presented authorizing the officers of the company to purchase at a price not above par \$30,000 of the stock of the Reserve Company, "in accordance with the authority and instructions given by the stockholders at their meeting of December 5th, 1894." The record does not show what action, if any, was taken by the board, but all parties have assumed that the resolution was duly adopted. What was done in execution of it is the reason for this action.

It is alleged in the complaint that the 300 shares were purchased by or for the Mercantile Company on the twenty-seventh of October. My conclusion is, after a careful study of the confused, contradictory and impossible testimony relating to the transaction that the purchase was in fact made about the third of March. On that day, according to the books of the Mercantile Company, the com-

App. Div.]

First Department, January, 1906.

pany loaned to the defendant Berry the sum of \$30,000, taking his note therefor payable on demand with five per cent interest, and as collateral 300 shares of Reserve Company stock. Berry was the brother-in-law of Mr. Deen, the president of both companies. He was in no business, and he testified that his "means" at the time referred to did not amount to \$5,000. When called as a witness by the plaintiff he admitted his signature to the note and his indorsement on the company's check, but could not tell what was done with the money nor where the collateral came from, nor whether the loan had been paid nor any other fact or incident connected with the transaction. Later in the case, when examined by his own counsel, he testified that he "made a loan from the company, or they took my note and I took the stock — three hundred shares;" that he bought the stock from the Mercantile Company; that he "wanted the stock and bought it;" that he did not purchase it from the company, but from Deen, Male, Bach, Herzig and Smith; that he paid no consideration for it; that it was transferred to him without consideration, and that he turned it over to the Mercantile Company. He also testified that he gave up the check for \$30,000 to one of the officers of the company, and that he, personally, "never got a dollar" of it. This portion of his testimony is true, for the proofs show that what happened was as follows: On the 3d of March, 1896, the certificate of deposit for \$30,000, dated December 30, 1895, was returned to the Phenix Bank, approved by Herzig, Male and Bach, three of the executive committee named in it, and the Mercantile Company was credited with that sum in its account. On the same day the Mercantile Company made its check on the Phenix Bank to the order of Berry. It was indorsed by him in blank and delivered to the company, and was used on that day to pay off the loans made by the bank to Deen and his associates, with which they purchased the 300 shares from the company on December 30, 1895. On the following day (March fourth) the executive committee held a meeting — Bach, Male, Herzig, Deen and Smith being present, and the minutes show as follows: "It was moved, seconded and carried that a demand loan be made to Oliver F. Berry of \$30,000, secured by stock of the Reserve Company." The transfers of the 300 shares by these five gentlemen to Berry are dated the twenty-sixth of March. The testimony of Mr. Deen is that the 300

shares were "practically purchased" by the Mercantile Company in March; that Berry never applied to the company for a loan; that he made the loan and gave the note at his (Deen's) request; that the purchase took the form of a loan rather than of an absolute purchase "solely for the convenience of the accounts of the company;" that it was carried as a loan in the name of Berry "for the convenience of keeping the matter alive on our books;" that Berry "was carried on our books as owing the company \$30,000 for the sole purpose of keeping the transaction alive pending negotiations which we were having, increasing the capital stock or for the sale of the business to the Ocean or the other company;" that "it was the idea of myself that it was better to carry it that way than to thoroughly liquidate it through the books of the company," and that the check given to Berry "was cashed, and the proceeds were used to pay for the stock which was bought from the gentlemen by whom it was transferred to Mr. Berry to make the loan."

From the foregoing it plainly appears that the only parties benefited by the alleged loan were the parties who authorized it and who owned the stock which the money was "loaned" to purchase.

In the journal of the Mercantile Company, under date of October 27, 1896, appears the following entry: "Suspense Acct.—To Loan Acct.: For 300 shares Reserve Co. stock collateral to O. F. Berry's loan dated March 3, 1896. Purchased from him at par, \$100 per share, in accordance with resolution of the Board of Directors adopted at meeting held Wednesday, February 5, 1896—\$30,000." There is no evidence showing nor, as I understand it, is it pretended by any party, that any purchase of this stock by the company from Berry was ever in fact made or was ever the subject of agreement or negotiation or consideration in any form between Berry and the company, or that Berry was in any manner informed that the company had assumed to take over the stock in satisfaction of his note. His testimony is that he had nothing to do with negotiating the loan; that he didn't know who paid it off; that he don't know how it was paid off; that he don't know when it was paid off he presumes it was paid because he "never heard anything from it." This goes to confirm what has been before said in substance — that Berry was a mere convenience, lending himself at the request of his brother-in-law, the president of the Mercantile Company, and

App. Div.]

First Department, January, 1906.

having no interest whatever in the transaction of the third of March, and that the real parties to that transaction were the five owners of the 300 shares of stock and the company whose money paid them for it at par.

The directors of the Mercantile Company met on the 5th of November, 1896. All of the defendants except Fitzgerald were present. "The president reported that in pursuance to a resolution of the board of directors of Feby. 5th, 1896, under authority given by the stockholders at their meeting of Dec. 5th, 1894, he had purchased 300 shares of the Reserve Company's stock at par. On motion, the action of the president in the purchase of this stock was and the same is hereby ratified and approved." The annual meeting of the stockholders of the company was held on February 4, 1897. Thirteen hundred and sixty-two of the 2,000 shares of stock were represented. The minutes show as follows: "It was moved, seconded and carried — Resolved, that all acts of the Board of Directors and its Executive Committee for the past year be approved and confirmed." In March or April, 1897, the Mercantile Company sold its business to the Ocean Accident and Guaranty Company, an English corporation, and went into liquidation. In August of the same year judgment dissolving the company and appointing the plaintiff receiver of its assets was entered in an action in this court brought by the People of the State.

It is urged by one of the learned counsel for the defendants that if, in March or October, 1896, these 300 shares of Reserve Company stock were worth \$30,000 on the market, or were worth \$30,000 to the Mercantile Company no matter what their market value may have been, or if the defendants, exercising a reasonable judgment, had reason to believe and did in good faith believe that the stock was in fact worth that sum, in either case the defendants cannot be charged with official wrongdoing and there can be no recovery in this action. The first suggestion is easily disposed of. The testimony of one of the defendants is that at no time had the stock any special market value, and there is nothing in the case tending to show the contrary.

The argument made in support of the second suggestion is, in substance, that by acquiring the stock the Mercantile Company relieved itself from the payment on it of a dividend of five per

cent per annum and possibly of a larger dividend. It has already been mentioned that the William Bro Smith agreement provided that in consideration of his paying to the Mercantile Company the sum of \$100,000 in stock and cash, the company would pay to him or his assigns "the sum of One dollar for each One thousand dollars of insurance in force on the books of the said The Mercantile Credit Guarantee Company, at its home office in New York, on the first day of January, One thousand eight hundred and ninety-five, and on each succeeding first day of January during the continuance of this contract," and that, until the \$100,000 should be fully paid the said Smith or his assigns should only be entitled to such proportion of said one dollar per thousand "as the amount paid shall bear to the said sum of" \$100,000. The amount of insurance in force on the 1st day of January, 1895, was \$5,134,084, which would insure a dividend on the issued stock of the Reserve Company of about five per cent. The amount of insurance in force on the 1st day of January, 1896, was \$4,793,500, and on the 1st day of January, 1897, was only \$4,096,500. The only asset the Reserve Company had was the Bro Smith contract. The only value its stock could possibly have was what it derived from the covenant of the Mercantile Company to pay the \$1 on each \$1,000 of insurance. The figures given above show that the business of the Mercantile Company was steadily decreasing. Its business for 1895 obligated it to pay less than five per cent, and for 1896 only four per cent on the Reserve Company stock. That stock was not a marketable stock; it could not be reckoned as an "asset" of the Mercantile Company; Mr. Male, one of the defendants, says that his opinion was that it was more advantageous to the company to have \$30,000 in cash than the stock in its treasury. When asked, "In your judgment at that time (March 3, 1896), was the thirty thousand dollars worth of Reserve Company stock in the ownership of the Mercantile Credit Guarantee Company as valuable to it as thirty thousand dollars of cash?" he answered, "In my judgment I should have preferred the cash;" and when asked, "Are you able to mention any advantage to the company in the repurchase of that stock?" he answered, "No." No such advantage is disclosed by the testimony of any witness, and it is impossible to find as a fact upon all or any of the proofs in the case that the stock

App. Div.]

First Department, January, 1906.

was worth its par value to the Mercantile Company either in March or October, 1896.

What has been said answers in part the third suggestion, which is, that the defendants had reason to believe and did in good faith believe that the 300 shares were worth the amount paid for them by the Mercantile Company. By what facts in the case can such a belief be explained or defended? The defendants knew the exact condition of things. They knew how and for what purpose the Reserve Company had been organized; and what its capital stock represented; and that outside of the 500 shares which were exchanged for shares of the Mercantile Company and the 300 shares in question, only one share of its stock had been subscribed for or disposed of; and that the business of the Mercantile Company was on the decline; and that the real value of the Reserve stock was necessarily declining with it; and that at the very time the purchase of the 300 shares was authorized and made, negotiations were pending for the sale of the business of the Mercantile Company to another corporation. They, or some of them, testify that they expected that the Mercantile Company would continue in business, and that, with an increased capital and surplus, its business would be extended, whereby the Reserve Company stock would be made more productive; but such expectations are not to be taken into serious account in estimating the present value of a stock in respect to which they are indulged. They also testify that in March, 1896, their opinion was and they believed that the stock of the Reserve Company was worth par. My judgment is that the facts in evidence do not furnish any good or reasonable grounds for such a belief—and in calculating the weight to be given to such an opinion it must be remembered that the parties who testify, with two or three exceptions, are the parties who had the stock for sale, and whose action in selling it to a corporation of which they were trustees is a subject of inquiry in this case.

It is further strenuously insisted on the part of the defense that the \$30,000 which the defendants are charged with having wasted never, in any true sense, formed part of the assets of the Mercantile Company, and that even if it did become part of the company's assets on the 30th of December, 1895, its disbursement on March 3, 1896, was not a waste, as the sale of the 300 shares by the company

on the former date, and the purchase of the same shares by the company on the latter date, constituted a single transaction and must be judged as an entirety; and that in its entirety it resulted in no loss to the company or profit to the directors. The very able argument of counsel in support of these propositions has not convinced me. He reaches his conclusion through a denial of the accuracy of some of the testimony of his client and of other of the defendants, and says they have called things by the wrong names. In explanation I refer briefly to a few of the undisputed facts. In July, 1895, five of the defendants paid the Reserve Company \$30,000 for 300 shares of its stock, and that sum was paid by the Reserve Company to the Mercantile Company on account of the Bro Smith contract. In August, September and October the five sold the same shares to the Mercantile Company. In December the Mercantile Company sold the same shares to the same five gentlemen. In March, 1896, the five resold the same shares to the Mercantile Company. In each instance the purchase price was paid and there was an assignment or delivery of the shares. The defendants Herzig, Bach, Male, Smith and Deen, who were parties to these several transactions, speak of them as purchases and sales. Smith, one of the five who contributed in July and again in December to the fund of \$30,000 which was used in the purchase of Reserve Company stock, says that on each occasion there was an "absolute purchase." Mr. Male says that the \$30,000 paid by the five directors for the 300 shares in December, 1895, "became a part of the (company's) assets." He does not state this as an opinion, but as a fact. The proofs, in my judgment, establish the fact. To swell the company's assets was the very purpose for which that fund was raised. The situation of the company was such that, according to all the testimony, it had to have more assets, sufficient to largely increase its surplus or reserve, or retire from business in several States. The Reserve stock not being available as an asset, it was sold, that its proceeds might be added to the company's surplus, which was done. Mr. Deen says that the \$30,000 was the "real, actual, absolute property" of the company in December, 1895, and in March, 1896, and that the money loaned to Berry in March was the company's money.

Counsel, however, claims that each of the purchases by the five



App. Div.]

First Department, January, 1906.

directors from the Mercantile Company of the Reserve Company stock was a purchase in form only, and was made with the understanding that when the object for which the purchase in form was made was accomplished, the Mercantile Company would return the money and take back the stock. The object referred to was to enable the company to report to the insurance departments in Ohio and other States that it had in hand the surplus which those States demanded. The testimony relating to this point is as follows: Mr. Herzig says "there was no stipulation about paying it (the money) back" on either occasion; that there was no agreement, but he relied upon getting his money back by means of the resolution of the stockholders of the company — referring to the resolution of December 5, 1894; that he relied on the stock being purchased from him "provided that the Mercantile Credit Guarantee Company did not need the money any further for the purpose of carrying it as a reserve." Mr. Male says that when he and his associates, in December, 1895, paid \$30,000 to the Mercantile Company for the 300 shares he expected the Mercantile Company to buy back the stock; that there was no agreement, written or oral, on the part of the company to repurchase the stock, but "it was understood between us all;" that there was an understanding (meaning expectation, he says) in their own minds that \$30,000 "tided them over this period and then it was to be repurchased." Mr. Bach says that there was no stipulation, express or implied, on the part of the Mercantile Company to take the Reserve stock off the hands of himself and his associates; that so far as he knew all there was on that subject was the resolution of the stockholders, and that on the strength of that resolution he contributed his share, "hoping to be relieved of that subscription." The stockholders' resolution of December 5, 1894, authorized the board of directors, whenever they should deem it to be to the interest of the company to do so, to buy with its surplus or reserve funds stock of the Reserve Company at a price not greater than par. Upon the testimony it may be safely assumed, I think, that the value of the Reserve stock was not a matter of consideration when it was purchased by the five associates in December, and that the "interest of the company" was not taken into account when it was sold by them to the company in March. The purchase was made by the five to relieve the company

from an embarrassment and enable it to continue to do business in certain States; the sale was made to the company in order to reimburse the five the money they had expended, or relieve them from the liabilities they had incurred in making the purchase. The five purchasers were a majority of the company's directors; the power was in their hands, and it is highly probable that when, as individuals, they bought the 300 shares in December they intended to subsequently sit down as directors and authorize its purchase from themselves by the company. Four of them and Berry did authorize such purchase on the fifth of February; the five, as the executive committee, authorized the loan to Berry on the fourth of March, and, with Hinckley and Berry, approved and ratified the purchase at a directors' meeting on the fifth of November. I do not see how the sale by the company in December and the purchase of the company in March can properly be called parts of one transaction. When the company sold the stock and received the money the transaction on its part was completed. The purchasers were free to sell the stock in any market for any obtainable price to any party. It is conceded that there was no agreement or stipulation on the part of the company to buy it back. The only circumstance connecting the December transaction with the one in March was the knowledge or belief of the purchasers that under the stockholders' resolution, above referred to, they had the power as directors to take the stock off their own hands and transfer it to the company. Whether such a proceeding was discussed or considered by them the testimony does not disclose. Mr. Herzig relied "on getting the money back \* \* \* by that resolution." Mr. Bach contributed on the strength of the resolution "hoping to be relieved of that subscription." Mr. Male says there was "an expectation in our own minds that it (the stock) was to be repurchased." So much, on the part of the purchasers. On the part of the company there was nothing — no agreement, no promise, no obligation of any sort. On its part the question of repurchase did not enter at all into the transaction of December thirtieth.

Much weight is given by counsel to the fact that the \$30,000 paid for the 300 shares in December was not deposited in bank to the general credit of the company, but specially, and that a certificate of deposit was issued therefor payable to the order of the

App. Div.]

First Department, January, 1906.

company "approved by either three of the executive committee." This does not impress me as a matter of importance. No such special deposit was authorized by the company, nor was it afterwards approved by the directors as was the deposit of July 9, 1895. The purchase of the stock by the five was not made upon condition that the money should be so deposited. Mr. Deen testifies that the purchasers did not insist upon such a deposit, and there was no understanding that the money should be held in bank for the purpose of buying back the stock, nor for any particular purpose, nor for any particular period of time. Counsel for all of the defendants except Mr. Male say in their brief (speaking of the check deposited in July, 1895), "it cannot be doubted that when deposited to the credit of the Mercantile Company it became the property of that company, no matter how it was to be drawn out;" and speaking of the check deposited on the thirtieth of December, they say: "No matter whether it was deposited subject to the check of either Mr. Male or Mr. Bach in the alternative, it certainly could have been attached by the creditors of the Mercantile Company and must be held to have been its property."

It is further insisted that the plaintiff, as receiver, can enforce only such right of action as the corporation had against these defendants and to which he has succeeded, which may be admitted (*Higgins v. Tefft*, 4 App. Div. 62); and that no right of action against the defendants or any of them for waste or other misconduct existed in favor of the Mercantile Company, for the reason that the purchase of the Reserve Company stock was not only expressly authorized by the stockholders at their special meeting on December 4, 1894, but was also approved by them at their annual meeting on February 4, 1897. The stockholders' resolution of December 4, 1894, was in these words: "*Resolved*, that the Board of Directors be and they are hereby authorized and instructed at their pleasure, and whenever they deem it to be to the interest of the company to do so, to purchase or buy from any source obtainable stock of the Reserve Company of New York, at a price not above the par value of said stock, and the money used in the purchase of said stock shall be deducted from the reserve or surplus of this company over and above its capital, \* \* \* and the stock so pur-

chased shall not appear as an asset of the company." Now the defendants say that in purchasing the 300 shares of Reserve Company stock they were either performing a duty imposed, or exercising an authority or discretion conferred, upon them by the corporation through this resolution; hence the corporation could have no cause for complaint against them. That depends upon whether their judgment, exercised in good faith after a reasonable consideration of all the facts, was that it was "to the interest of the company" to make the purchase. I have already expressed the opinion that the testimony shows that there were no reasonable grounds for such a judgment. The testimony also satisfies me that in making the purchase the interest of the company was not considered. Had that been discussed or taken into account, certainly some one of the defendants could have explained how the conclusion was reached that it would be to the interest of the company to buy the stock. No such explanation was made or attempted, and one of the defendants, a gentleman of intelligence and large business experience, who was active in the affairs of the Mercantile Company and a party to the transaction in question, admitted on his cross-examination that the stock had not at any time any special market value, and that \$30,000 in cash in the company's treasury was preferable to the 300 shares of stock, and to the question, "Are you able to mention any advantage to the company in the repurchase of that stock?" answered, "No." The testimony makes it plain, I think, that the intention to use the stockholders' resolution as a means of getting rid of the 300 shares existed in the minds of the five defendants when they bought the shares of the company in December, 1895, and that that intention influenced them in making the purchase, and that when that intention was subsequently carried into execution neither the value of the stock nor the interest of the company was made a matter of consideration. In my judgment the resolution of December 5, 1894, furnishes no protection to those of the defendants who would otherwise be liable in this action.

I am also of the opinion that the liability incurred by the defendants, or some of them, by the purchase of the Reserve Company stock was not released nor in any respect affected by the resolution adopted at the stockholders' meeting on February 4, 1897. In determining the effect of that resolution due regard must be had to

App. Div.]

First Department, January, 1906.

the character of the transaction which it is claimed was validated by it. Of a similar transaction the court said in *Munson v. S., G. & C. R. R. Co.* (103 N. Y. 73): "He stood in the attitude of selling as owner and purchasing as trustee. The law permits no one to act in such inconsistent relations. It does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction or refuses to enforce it at the instance of the party whom the fiduciary undertook to represent without undertaking to deal with the question of abstract justice in the particular case. It prevents frauds by making them as far as may be impossible, knowing that real motives often elude the most searching inquiry, and it leaves neither to judge nor jury the right to determine, upon a consideration of its advantages or disadvantages, whether a contract made under such circumstances shall stand or fall."

It is not denied that a transaction falling within the condemnation of this rule may be accepted and ratified by the party entitled to avoid it, but the intention of the party to ratify the particular transaction must be clearly manifested. "Full knowledge of the act assented to, and an intention to adopt the act as the act of the corporation are, therefore, essential. A corporation can never be charged with an unauthorized act of its agents, on the sole ground that the act has been ratified by the shareholders, unless the shareholders had full knowledge of the act." (2 Morawetz Corp. [2d ed.] § 628.) It appears that of the total capital stock of the Mercantile Company, 1,362 out of 2,000 shares were represented at the stockholders' meeting on February 4, 1897. Of these 1,362 shares a majority, or 787 shares, were held by the defendants in this action. Of the remaining 575 shares 509 were represented by proxies, nearly all of which were held and voted by Mr. Deen. It will be seen, therefore, that the meeting was entirely in the hands of the parties whose official acts are said to have been presented for approval and approved. The resolution adopted was as follows: "It was moved, seconded and carried—Resolved, that all acts of the Board of Directors and its Executive Committee for the past year be approved and confirmed." If the purchase of the Reserve Company stock was a wrongful use and a waste of the funds of the Mercantile Company, as in my opinion it was, then the parties, who, as

officers of the company, participated in it, were not qualified or competent, as stockholders, to discharge themselves from liability for the injury done to the company by their malfeasance. This is frankly admitted by at least one of the learned counsel for the defense. Even if the resolution had been adopted by the votes of a majority of stockholders, not officially related to the company, and voting in person, it should be held to operate only to the extent that the stockholders were informed of the "acts" which they were invited to confirm. In *Farmers' Loan & Trust Co. v. San Diego St. Car Co.* (45 Fed. Rep. 518, 527) the defendant company had issued bonds for the purposes of construction, equipment, operation, etc. They were diverted by some of the officers and pledged to secure debts existing against the company. The court said: "It is contended that if the pledging of the bonds in question was not originally valid, it was made so by the resolution adopted at the stockholders' meeting of January 28th, 1889, by which all the acts of the board of directors and officers of the company during the year then last past\* confirmed, ratified and approved. If the pledging of the bonds in question admitted of ratification, I do not think, in view of the evidence in the case, that the general and sweeping resolution ratifying 'all the acts of the officers' constituted a valid ratification of the acts in question. I think the record fails to show the *knowledge of facts* that is requisite to the validity of such ratification." This language seems to be precisely applicable to the case in hand. The record of the entire proceedings of the stockholders' meeting is in evidence. A report was read by the president "showing the position of the company, the amount of insurance written, fees collected and in course of collection, and the expenses incurred." It does not appear that any reference, direct or indirect, was made to either the expenditure of \$30,000 in the purchase of Reserve Company stock or the "loan" to Berry. It can hardly be doubted that the only persons present at the meeting (with perhaps one exception) who had any knowledge of these transactions were those who had authorized them and carried them through and benefited by them. The defense of ratification ought not to be sustained.

My conclusion is that the plaintiff is entitled to judgment against some of the defendants. Not against Fitzgerald, for he did not

---

\* *Sto.*

App. Div.]

First Department, January, 1906.

unite with the others either in authorizing the purchase (*Hun v. Cary*, 59 How. Pr. 430), or in approving it when made, nor was he interested in the stock sold to the company. Nor against Hinckley, for he was not interested in the stock or its proceeds, and had no connection with the transaction beyond voting in November to approve the purchase which had been made and paid for in the preceding March. It is claimed in behalf of Mr. Male that no recovery can be had against him inasmuch as the charge in the complaint is that the defendants "as directors \* \* \* authorized and directed the purchase of and did purchase" the Reserve Company stock, and that such authority and direction were given at a directors' meeting on February 5, 1896, at which he was not present. This, it seems to me, is not sufficient to excuse him. While he did not vote to authorize the purchase, he took an important part in carrying it through; he furnished part of the stock which was purchased under the authority of the resolution; he indorsed the certificate of deposit by which the Mercantile Company was enabled to obtain the moneys with which the stock was paid for; he received his share of such moneys on the third of March; on the next day, as a member of the executive committee, he voted to authorize the loan to Berry, which was, in effect, an approval or adoption of the transactions of the day preceding, and at the directors' meeting in November he voted to ratify the action of the president in purchasing the stock.

The remaining question is that of damage. The Mercantile Company paid \$30,000 in cash for the 300 shares of stock. The character and quality of the stock and the property or assets of the Reserve Company represented by it have already been described. The stock was not available to the Mercantile Company as an asset. It could not be sold, as there was no market for it. The actual loss sustained by the Mercantile Company through the action of the defendants was \$30,000, less the sum of \$1,241.67 which it received, or retained, rather, as dividends on the stock. The fact that two or three dividends were declared during 1896 on account of insurance written during 1895 does not, under the facts disclosed by the evidence, go far in the direction of showing that the stock itself had any real or substantial value at the time of the sale. The proofs convince me that it had no such value.

As to the defendants Fitzgerald and Hinckley the complaint should be dismissed, with costs. As against the other defendants, the plaintiff is entitled to judgment for \$30,000 and interest, less \$1,241.67, with costs.

The plaintiff, if so advised, may amend his complaint so as to conform it to the proofs relating to the date of the purchase of the stock.

---

In the Matter of the Appraisal of the Estate of SIMEON G. CURTICE, Deceased, under the Acts Relative to the Taxable Transfers of Property.

EDGAR N. CURTICE and Others, as Executors, etc., of SIMEON G. CURTICE, Deceased, and GRACE C. CURTICE, Legatee, Appellants; THE COMPTROLLER OF THE STATE OF NEW YORK, Respondent.

Fourth Department, January 3, 1906.

**Inheritance tax — valuation of unlisted stock in private corporation.**

A large but minority holding of unlisted stock in a private business corporation controlled by a family should not be valued at the record figures of isolated sales of small blocks thereof in assessing an inheritance tax thereon. The value of a large block of such unlisted stock not conveying a controlling interest may be less for the purposes of sale than the figures shown by records of sporadic sales of small parcels of such stock, and when there is uncontradicted evidence that the value of such stock is \$80 and \$90 a share the appraisal thereof at \$110 and \$107.50 solely on the record of isolated sales at such figures is too high.

*It seems*, that when such stock is not the subject of free and customary market dealing, the manner of appraisal by record sales provided by Laws of 1891, chapter 34, does not apply.

SPRING and WILLIAMS, JJ., dissented.

APPEAL by Edgar N. Curtice and others, as executors, etc., of Simeon G. Curtice, deceased, and another, from certain portions of an order of the Surrogate's Court of the county of Monroe, entered in said Surrogate's Court on the 26th day of July, 1905, assessing the inheritance tax due upon the estate of the said decedent.

*M. H. McMath* and *Walter S. Hubbell*, for the appellants.

*William T. Plumb*, for the respondent.



App. Div.]

Fourth Department, January, 1906.

HISCOCK, J. :

The appellants' sole complaint is that the surrogate has approved and fixed too high a valuation and too large a tax upon certain capital stock belonging to the estate of the decedent and passing under his will to his daughter.

I think that the complaint is well founded and that the valuation and resulting tax should be reduced.

The specific property involved is 3,737 shares of the common, and 2,025 shares of the preferred, capital stock of Curtice Brothers Company, and which has been appraised at \$110 and \$107.50 per share. It is claimed that said valuations should not have exceeded \$80 and \$90 per share respectively. While the determination of the values of these stocks must be more or less a matter of speculation, I think that a valuation of the preferred stock at \$97.50 and of the common stock at \$100 per share will be nearer correct for the purposes of this proceeding than that adopted by the learned surrogate.

Curtice Brothers Company was a private family corporation, engaged in manufacturing catsups, jellies, etc., and having its principal place of business in Rochester. The entire capitalization of the company consisted of 7,000 shares of preferred and 8,000 shares of common stock. The active manager of the company was a brother of the deceased. The company had been in existence four or five years and had paid dividends at the rate of ten per cent per annum upon the common, and of seven per cent per annum upon the preferred.

The stock, as might be expected, was an inactive one. It does not appear to have been listed or dealt in upon any stock exchange or market other than the local one at Rochester. A few scattering sales had been reported at the latter during the year or more preceding decedent's death, and immediately after his death there was a bid quotation of \$110 per share for the common and a reported sale upon the exchange sheet of ten shares of the preferred at \$107.50, and which figures were adopted by the surrogate. Outside of one sale of fifty shares at 105½ there is no evidence of any sale of or quotation upon a larger lot of stock than ten or twenty shares. Only two witnesses were sworn as to the value of the stock, and they seem to have been entirely familiar with the limitations of the market for it, and with the conditions and considerations which

would fix its value. They agreed that the fair market valuations would be for the preferred ninety and for the common eighty. Upon cross-examination they referred to the sales of occasional small lots at the higher prices already mentioned, and accounted for the difference between such prices and the valuations fixed by them by and upon the theory in substance that while small lots could be sold for the higher prices, there would not be a demand which would absorb in any reasonable time the large amount held by decedent's estate at such prices.

It is urged by the learned counsel for the respondent that this theory is hypothetical and speculative, and that it should yield to the concrete fact that some of the stock has actually been sold or bid for at the prices adopted by the surrogate. But in my judgment the fact referred to is not wholly applicable to or controlling of the conditions and question now presented to us.

The basic issue to be determined by the surrogate was what was the "clear market value," the "fair market value" of 3,737 shares of the common and of 2,025 shares of the preferred stock in question, for purposes of taxation, with a reasonable time and under fair opportunities for purchase. The executors would not be justified in recklessly and precipitately throwing the stock upon the market in such a manner as would inevitably invite sacrifice. Neither should they be compelled to occupy an indefinite time in the attempt to peddle the stock out in ten-share lots.

It must be apparent at once that the question thus presented under the circumstances of this case is a very different one from that of the prices obtained for a few small lots from time to time, and mostly before any possible complications were suggested by the death of decedent.

The only witnesses sworn testified positively that there would not be a market for such a large amount at the higher prices, and that the valuations named by them would be a fair market price.

It is true that that is an opinion merely, but it is the opinion of conceded experts who are not contradicted except by the record of the sales already referred to. Moreover, ordinary observation and judgment tends to confirm their opinion, at least to some extent.

Here was a total holding of stock of the par value of \$576,200 out of a total capitalization of \$1,500,000. Yet while it represents

App. Div.]

Fourth Department, January, 1906.

a very large amount, it was still a minority holding in a private corporation controlled by the family to which decedent had belonged. The stock was closely held. There was no general and public ownership of it or market for it, and while an investor might be willing to take a small amount at a high price, possibly determined by dividends, it does not follow that there could be found to absorb so large an amount either a sufficient number of small purchasers or large purchasers, who would be willing to invest so large a sum which still would not give them control, but leave them more or less at the mercy of a united family. It needs no extended argument to show that the sale of this large minority block of stock in a comparatively small concern upon a local and restricted market, is entirely different from that of a sale of much larger amount of the stock of a large and public corporation in a broad and general market like the New York Stock Exchange. It must be more or less a matter of opinion and even of conjecture what could be obtained for it. But what I *do* feel very certain of is, that the price obtained for a few little lots is not a fair measure of valuation for the large amount involved in these proceedings, and that the valuation suggested of par for the common and eighty-seven and one-half for the preferred is quite liberal in view of all the attendant contingencies. No evidence was given as to the intrinsic value of the stock outside of the fact that it paid certain dividends. We may, however, take judicial notice of the fact that the value of industrial stocks often does not bear close apparent relations to the rate of dividends which they may happen to pay at a given time, and the latter is not by any means a controlling gauge of values. (*Matter of Smith*, 71 App. Div. 605.)

Counsel for respondent especially calls our attention to a statute and to a decision of the Court of Appeals as justifying the action of the surrogate.

Chapter 34 of the Laws of 1891 provides that "Whenever \* \* \* it shall become necessary to appraise in whole or in part the estate of any deceased person \* \* \* the persons whose duty it shall be to make such appraisal shall value \* \* \* all such property, stocks, bonds, or securities as are customarily bought or sold in open markets in the city of New York, or elsewhere, for the day on which such appraisal or report may be required, by ascertaining

the range of the market and the average of prices as thus found, running through a reasonable period of time."

Assuming that this statute might be applicable to such an appraisal as this, I think it quite apparent that it is not controlling here. The evidence does not disclose any such free or customary market dealings in the stock in question as fairly to bring it within the scope of this statute.

The same surrogate who decided this proceeding held that said statute was not applicable to the appraisal in a similar case of an inactive stock of which there were infrequent sales. (*Matter of Judson* [not reported], *affd.*, 73 App. Div. 620.)

The decision referred to is that found in *Dana v. Fiedler* (12 N. Y. 40). In that case the defendant had defaulted in performance of a contract to deliver certain articles, and he attempted to reduce damages by showing that if plaintiff had attempted to sell, the market price as evidenced by sales proved might have been broken. I think the case may be distinguished from this. In the first place the courts would be less liberal in laying down the rule of damages against a defaulting vendor than in fixing the fair market value of an estate for the purpose of taxing an heir who had been guilty of no default or wrongdoing. In the second place the rule is and was well established that plaintiff for his measure of damages was entitled to the difference between his contract price and the price at which he could purchase in the open market. Therefore, the immediate question was not of selling, but of buying. And in the third place, the opinion does not indicate any such cogent evidence as in this case of the probabilities which would attend the attempt to sell a large amount of property.

I do not think there is anything in the case which compels us to attempt to look over or around the results to alleged market prices which in my judgment obviously would follow the effort to sell the stock in question.

The order appealed from should be modified by deducting from the total valuation of decedent's estate, as also from the amount transferred to Grace C. Curtice, the sum of \$57,620 (which is the difference between the amounts at which the capital stock in Curtice Brothers Company was appraised at par and \$97.50 per share for the common and preferred stocks respectively), and by deducting one

App. Div.]

First Department, February, 1906.

per cent, or \$576.20, from the total tax as well as from the tax upon the share of said Grace C. Curtice. And as so modified said order should be affirmed, without costs to either party.

All concurred, except SPRING and WILLIAMS, JJ., who dissented.

Order modified by deducting from the total valuation of decedent's estate, as also from the amount transferred to Grace C. Curtice, the sum of fifty-seven thousand six hundred and twenty dollars (\$57,620), (which is the difference between the amounts at which the capital stock in Curtice Brothers' Company was appraised and par and ninety-seven dollars and fifty cents (\$97.50) per share for the common and preferred stocks respectively), and by deducting one per cent or five hundred seventy-six dollars and twenty cents (\$576.20) from the total tax, as well as from the tax upon the share of said Grace C. Curtice; and as so modified said order is affirmed, without costs of this appeal to either party.

JOSEPH F. TERRIBERRY, Appellant, v. LOUIS MATHOT, Respondent.

First Department, February 23, 1906.

**Mistrial**—verdict received in absence of presiding justice—when irregularity waived.

When after the submission of a case to a jury the trial justice leaves the bench and the verdict is received by another justice of the same court, it is at most an irregularity which may be waived by the parties.

When no objection is made to the reception of such verdict, but on the contrary the counsel for the defeated party makes various motions which stand over for the consideration of the justice who presided, the irregularity is waived.

APPEAL by the plaintiff, Joseph F. Terriberry, from an order of the Supreme Court, made at the New York Trial Term and entered in the office of the clerk of the county of New York on the 4th day of October, 1905, as modified by an order entered in said clerk's office on the 30th day of January, 1906, granting the defendant's motion to have the trial had herein declared a mistrial and to set aside the verdict rendered in favor of the plaintiff.

*Walter C. Flanders*, for the appellant.

*William L. Mathot*, for the respondent.

PATTERSON, J. :

This action was tried by the court and a jury, Mr. Justice MACLEAN presiding. It was submitted to the jury and Mr. Justice MACLEAN left the bench. The verdict, which was for the plaintiff, was received by Mr. Justice AMEND without objection. The defendant's counsel then and there made various motions which stood over for the consideration of the justice who presided at the trial. There was no motion then made to set aside the verdict on the ground of a mistrial, but several days after the verdict was rendered the defendant's counsel moved before Mr. Justice MACLEAN to set it aside on the ground of a mistrial in that the verdict was improperly received. No actual consent appears in the record to the verdict being received as it was, but apparently the course pursued was with the acquiescence of the defendant's counsel. The motion was granted, and from the order entered thereupon this appeal is taken.

This order was doubtless made in reliance upon certain decided cases which seem to hold that a verdict in the absence of the justice who presided at the trial is unauthorized and invalid. Those cases, however, have been recently referred to, criticised and distinguished by the Court of Appeals in *Dubuc v. Lazell, Dalley & Co.* (182 N. Y. 482). It was there held that a verdict is not void because it was rendered in the absence of the justice who presided at the trial, where it appeared that the parties stipulated in open court that it should be received by the clerk, and it was stated in the opinion of the court that thus receiving a verdict is at most an irregularity which the parties could waive, while it would undoubtedly be competent for the court to relieve the defendant upon good cause shown.

The absence of the trial judge was a mere irregularity. There was another judge of the Supreme Court present at the time the verdict was received. The *Dubuc* case seems to us to control, as has already been intimated in the opinion of the court by McLAUGHLIN, J., when this cause was before us on an appeal from an order granting a new trial (110 App. Div. 370). Under the decision of the Court of Appeals in the *Dubuc* case the only matter for our consideration now is, whether there was a waiver of any objection that might have been taken to the reception of the verdict. That case was decided upon the particular facts and it was held that the judgment entered upon the verdict was not void, and

App. Div.]

First Department, February, 1906.

under the facts as they appear in this record we reach the same conclusion respecting the case at bar.

The order should be reversed, with ten dollars costs and disbursements, and the motion for a new trial denied, with costs.

O'BRIEN, P. J., INGRAHAM, LAUGHLIN and CLARKE, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion for new trial denied, with costs. Order filed.

---

JULIUS TISHMAN, Appellant, v. PETER P. ACRIPELLI, Respondent.

First Department, February 23, 1906.

**Lis pendens** — Code of Civil Procedure, section 1671, construed — specific performance — when *lis pendens* not canceled in such action.

Although the amendment to section 1671 of the Code of Civil Procedure, made by Laws of 1905, chapter 60, allows the cancellation of the *lis pendens* when "adequate relief can be secured to the plaintiff by a deposit of money or \* \* \* an undertaking," such *lis pendens* should not be canceled when it appears from the complaint or by established facts that the plaintiff may be entitled to the specific performance of a contract to convey lands. In such event the money deposited or the undertaking would not give adequate relief. Though the right to the specific performance can only be determined on trial the *lis pendens* will not be canceled when the complaint, or clearly established facts, show a right to specific performance.

APPEAL by the plaintiff, Julius Tishman, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 14th day of November, 1905, granting the defendant's motion to cancel the *lis pendens* theretofore filed in the action, upon giving an undertaking.

Harry A. Gordon, for the appellant.

Abraham Nelson, for the respondent.

INGRAHAM, J. :

The action was brought by the vendee for the specific performance of a contract for the sale of real property. The complaint,

after alleging the making of the contract and an adjournment, by consent, of the time to close title, alleges that at the time and place mentioned the plaintiff was ready, willing and able and offered to carry out and perform said contract, but that the defendant failed and refused to perform said contract on his part; failed and refused to convey a good and marketable title to said premises to the plaintiff free and clear from all incumbrances, with the exception of the mortgages and incumbrances specified in said contract, and that by reason of the premises the plaintiff has been and will be damaged in the sum of \$5,000. The judgment demanded is that the defendant be compelled to specifically perform and carry out said contract on his part, as in said contract provided, or in case specific performance thereof cannot be had by the plaintiff as therein provided, that the plaintiff have judgment against the defendant for the sum of \$5,000, besides costs.

The answer, by not denying, admits the making of the contract, denies that the plaintiff was able to perform, or that the defendant failed or refused to perform, and denies the damage alleged. Upon an affidavit of the defendant a motion was then made to vacate the notice of the pendency of action filed by the plaintiff, which motion was granted upon the defendant giving an undertaking in the sum of \$7,000. This motion was made under the amendment to section 1671 of the Code of Civil Procedure which took effect on September 1, 1905. (See Laws of 1905, chap. 60.) That section provides that "In any action \* \* \* in which a notice of the pendency thereof has been filed, and in which it shall appear to the court upon a motion made as hereinafter provided, that adequate relief can be secured to the plaintiff by a deposit of money, or, in the discretion of the court, by the giving of an undertaking, as hereinafter provided, \* \* \* any defendant, or any other person having an interest in the property affected by the action, may apply for the cancellation of such notice."

In *Bresel v. Browning* (109 App. Div. 588) we held that where it appeared by the complaint that the only relief to which the plaintiff would be entitled was a judgment for a sum of money the *lis pendens* should be canceled upon the making of a deposit or the giving of an undertaking sufficient to secure the payment of the amount that the plaintiff claimed. On the other hand, we



App. Div.]

First Department, February, 1906.

think that where the relief demanded is not the payment of a sum of money, but involves the right of the plaintiff to a conveyance of real property described, the *lis pendens* should not be canceled. It is only where "adequate relief can be secured to the plaintiff by a deposit of money" or by the giving of an undertaking that the court is authorized to cancel the *lis pendens*. If the plaintiff, upon the facts alleged in the complaint or facts clearly established, is entitled to a specific performance of the contract and a conveyance of the real property contracted to be sold, it is evident that adequate relief cannot be secured to the plaintiff by the deposit of a sum of money. The question depends ordinarily upon the relief that the plaintiff demands in the complaint and to which, under the allegations of the complaint, he is entitled. If the judgment asked, and to which the plaintiff would be entitled if the facts alleged in the complaint are true, includes something more than the payment of a sum of money, then the deposit of a sum of money would not secure to the plaintiff adequate relief if he succeeds. Here the plaintiff claims that he is entitled to a conveyance of the property. It is true that he also asks in the alternative that if such a conveyance be found impossible he be allowed to recover the damages that he has sustained, but that is only in case that he cannot obtain by the conveyance a good title to the property that the defendant has agreed to convey, a question which can only be determined upon the trial. The right of the plaintiff to retain the notice of pendency of action must be determined upon the allegations of the complaint, or facts clearly established, and we think that in this case the right of the plaintiff to a decree for specific performance of the contract and a conveyance of the real property therein described must be determined upon the trial. (*Smadbeck v. Law*, 106 App. Div. 552.)

It follows that the order appealed from should be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

O'BRIEN, P. J., LAUGHLIN, CLARKE and HOUGHTON, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs. Order filed.

WILLIAM N. BOLLER, Respondent, v. NAOMI S. BOLLER, Appellant.

THEODORE E. LAWTON, Corespondent, Appellant.

First Department, February 23, 1906.

**Divorce — when corespondent appearing in action not entitled to retrial of issues — Code of Civil Procedure, section 1757, construed.**

The appearance of a corespondent in an action for divorce pursuant to the permission granted by subdivision 2 of section 1757 of the Code of Civil Procedure does not invalidate the proceedings in such action prior to his appearance, and he is not entitled to a new trial of issues already disposed of.

While it seems that the court would have power to order a new trial on the 'intervention of such corespondent if necessary to give him a hearing for his protection, such new trial will not be granted when the corespondent before his personal appearance in the action had full knowledge thereof and was a witness at the trial.

Rights of an intervening corespondent discussed.

O'BRIEN, P. J., and McLAUGHLIN, J., dissented, with opinions.

APPEAL by the defendant, Naomi S. Boller, and by the corespondent, Theodore E. Lawton, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 24th day of May, 1905, upon the decision of the court rendered after a trial at the New York Special Term granting the plaintiff an absolute divorce, with notice of an intention by the said Lawton to bring up for review upon such appeal an order entered in said clerk's office on the 26th day of April, 1905, denying his motion to strike the cause from the calendar.

*George A. Stearns*, for the defendant appellant.

*Joseph P. Joachimson*, for the corespondent appellant.

*Henry W. Bookstaver*, for the respondent.

INGRAHAM, J. :

The appeal in this case presents a question arising under subdivision 2 of section 1757 of the Code of Civil Procedure, which does not appear to have been before decided. The action was brought for an absolute divorce against the defendant, the complaint charg-

App. Div.]

First Department, February, 1906.

ing that she at various times in the months of June, July, August and September, 1903, committed adultery with one T. E. Lawton. The defendant interposed an answer denying the adultery, whereupon on the 12th day of January, 1904, an order was entered by the Special Term directing that the issues of fact raised by the pleadings be tried by a jury. Those issues were tried on February 5, 1904, and the jury found as to all of them in favor of the plaintiff, whereupon the case was brought on at the Special Term for final judgment.

On March 25, 1905, before the hearing for final judgment, the corespondent served upon the plaintiff by mail a demand for the service of the summons and complaint. In pursuance of that demand the plaintiff served on the attorney for the corespondent on March 28, 1905, a summons and complaint. Thereafter, on April 17, 1905, the corespondent served an answer to the complaint. On the 19th day of April, 1905, the case came on for hearing at the Special Term; the plaintiff and the defendant answered ready, but the corespondent appeared and moved that the cause be stricken from the calendar upon the ground that he had received no notice of trial. This motion was made upon an affidavit of the attorney for the corespondent, stating that since the joinder of issue no notice of trial had been served upon the attorney for the corespondent. The plaintiff then produced a notice dated March 28, 1905, and served on that day, with an admission of service by the attorney for the corespondent, stating that the action would be brought on for trial at a Special Term of the Supreme Court on the 18th day of April, 1905, at ten o'clock. This notice, having been served before the service of the answer by the corespondent, was returned by the corespondent to the plaintiff's attorney. The motion to strike the case from the calendar was denied and an order duly entered, whereupon the plaintiff on the extract of the minutes of the Trial Term determining all the issues of fact raised by the answer of the defendant in favor of the plaintiff, applied for an interlocutory judgment of divorce. The counsel for the defendant and counsel for the corespondent objected to proceedings upon the ground that an issue had been raised by the answer of the corespondent which had not been disposed of. The court, however, overruled this

objection and filed a decision, finding the facts in accordance with the admission in the original pleadings and the finding of the jury, and directed a judgment awarding the plaintiff a divorce from the defendant. Both the defendant and the corespondent then submitted what are called requests to find, which simply related to the proceedings in the action. The court refused these proposed findings and awarded the plaintiff an interlocutory judgment. The refusal of the court to find these proposed findings of fact and conclusions of law were excepted to, and the defendant and corespondent appeal from the interlocutory judgment, the corespondent stating in his notice of appeal that he intended to bring up for review the order denying his motion to strike said case from the calendar, and these two appeals are now before us for determination.

The question is, as to what right the Code of Civil Procedure awards to a corespondent who thus injects himself into a controversy after the issues raised by the pleadings have been disposed of.

Prior to the year 1899 there was no provision authorizing a corespondent to be heard in an action for divorce. Section 1757 of the Code as then existing consisted of subdivision 1 of the section as it now exists. (See Laws of 1880, chap. 178.) By chapter 661 of the Laws of 1899 subdivision 2 of section 1757 of the Code was added. This subdivision provides that "in an action brought to obtain a divorce on the ground of adultery the plaintiff or defendant may serve a copy of his pleading on the co-respondent named therein." It is then provided that if no such service is made "any co-respondent named in any of the pleadings shall have the right, at any time before the entry of judgment, to appear either in person or by attorney in said action and demand of plaintiff's attorney a copy of the summons and complaint, which must be served within ten days thereafter, and he may appear to defend such action, so far as the issues affect such co-respondent. In case no one of the allegations of adultery controverted by such co-respondent shall be proved, such co-respondent shall be entitled to a bill of costs against the person naming him as such co-respondent, which bill of costs shall consist only of the sum now allowed by law as a trial fee and disbursements, and such co-respondent shall be entitled to have an execution issue for the collection of the same."

It will be noticed that this statute does not in express terms make

App. Div.]

First Department, February, 1906.

a corespondent a party to the action nor allow him to serve an answer to the complaint. He is not given the rights of a party to the action. He is not entitled to interfere in the determination of any issue of law or fact, except that he is allowed to "appear to defend such action so far as the issues affect such co-respondent."

With all of the questions presented he has no concern, except so far as he is directly affected, but when he is served with the pleading he has a right to defend so far as he is affected by any charge made in the pleading. This provision was intended to give to a corespondent, who thus brings himself into the litigation between the plaintiff and the defendant, the right to such a defense as is available at the time he is brought in by the service of the summons and complaint upon him. He comes into the action, not as a party, but as authorized to defend a charge made against him, and his defense, it seems to me, must be confined to a defense of the undisposed of issues at the time he comes into the litigation.

In determining the intention of the Legislature it is important to consider what the statute does not do. It does not make a corespondent a party to the action. It does not allow him to answer the complaint. It does not affect the validity of the proceedings already had at the time of service of process upon him. It does not allow a judgment against him, except for a trial fee and disbursements if he is unsuccessful in the defense. When he voluntarily appears and demands service of the summons and complaint, he is entitled to appear and defend the action so far as the issues affect him; but when in the action in which he thus appears there are no issues undisposed of, and all that remains to be done is the application for final judgment, it does not appear to have been the intention to create issues by his appearance which must be disposed of before judgment can be granted. I would have no doubt of the power of the court upon a proper case presented to set aside a verdict, decision or any other proceeding that had been completed in the action before the appearance of the corespondent, and thus give him an opportunity to defend; but no such application in this case was made, and no facts were presented that would justify the granting of such an application. The action had been at issue for some time; the corespondent had had notice of the charges against him, for he was present at the trial and was examined as a witness on

behalf of the defendant and took part in the trial. It is difficult to understand what more he could have done if he had before that time appeared in the action and had been served with the summons and complaint. It would certainly be an anomaly to hold that in an action where a wife charged with the commission of adultery had been found guilty after a fair trial, there could be in the same action another trial of the same issue, because a person not a party to the action had injected himself into the litigation and denied the adultery of which the wife had been found guilty upon a trial.

To sustain the contention of the correspondent it would be necessary to hold that, by allowing him to appear and defend, all of the prior proceedings in the action after the service of the pleadings were vacated, notwithstanding the fact that the principal defendant — the only person against whom there could be a judgment — had been found guilty of the charges made against her after a trial in which she had duly appeared and defended. If there had been a sufficient number of correspondents, and each one should time his appearance in the action so as to come in just before final judgment was entered, a number of trials could be had, only limited by the number of correspondents — a proceeding which certainly was not contemplated when this act was passed. The Code contemplates but one trial of an action. That trial has been had, and, so far as appears, it was in all respects regular and the issues of fact were determined. If that determination has become final no new trial of that issue can be had, unless the verdict be set aside either on motion or upon appeal. If that determination as to the issues raised by the answer of the defendant is final, and the issues raised by the answer of the correspondent should be tried and a verdict had in his favor, what judgment could be entered? The defendant would not be entitled to judgment, as the issues as against her have been determined in favor of the plaintiff; and no judgment could be rendered in favor of the correspondent, as no such judgment is authorized by the Code. It seems plain that such a result was not intended, but the intention of the Legislature can be given full effect by holding that when the correspondent comes into an action for divorce he is entitled to defend it as to all subsequent proceedings, so far as the prosecution of the cause affects the charges made against him. If an issue of fact as to the adultery remained undisposed of, he would be

App. Div.]

First Department, February, 1906.

entitled to take part in the trial of that issue, but if that issue had already been determined he would be confined to a defense of the subsequent proceedings, including a right to appeal. I have no doubt of the power of the court to set aside a verdict where it is necessary to give the corespondent a hearing for his protection; but certainly where he had full knowledge of the action and the charges made, and was a witness on the trial, his subsequent appearance should not affect the validity of the determination of the issues and compel the plaintiff again to go through with the trial which has been determined in his favor.

No authorities are cited by either party which affect this question. If it should be true, as claimed by the appellant, that this judgment will affect the corespondent as an adjudication against him, this situation is in consequence of his own action in appearing in the action after the issues of fact had been disposed of, he having full notice of the condition of the action at the time he required the plaintiff to serve upon him a copy of the summons and complaint. The cases of which *Wood v. Swift* (81 N. Y. 31) is an example have no application. There the action had been tried and submitted to a referee, who had not filed his report. At that time, a person interested in the result, as being a claimant of the fund to recover which the action was brought, was brought in as a defendant. As a part of the order bringing in this new defendant, the court ordered that the case should remain, continue and be tried before a referee with the same force and effect as if all parties had been parties from the beginning of the action. The judgment that would be entered would be against the new defendant, determining her right to the fund to recover which the action was brought, and if she was not successful in the action the judgment would foreclose her of any right to that fund. In such a case the trial therefore had could not bind the defendant who had been made a party, as the judgment that would be rendered would be a judgment directly against her. But, as before stated, no such condition exists here. There can be no judgment against this corespondent. The plaintiff asks for no judgment against him, and the court has awarded none. His position in the action is an anomaly and evidently allowed because of the peculiar nature of the action and the danger of collusion between the husband and wife, involving a charge

against a third person, who has no other opportunity of protecting himself from the charge, and certainly when such a third person, who had notice of the charge made against him and was present at the trial which determined the truth of that charge, deliberately delays appearing until after that charge has been finally determined, he has no cause of complaint because the court refuses to reopen the case and allow him a retrial of the issues. In determining this appeal it is sufficient to hold that the provisions of this section of the Code do not invalidate the prior proceedings in an action upon the appearance of a corespondent, and that where he appears in such an action he comes in subject to its condition at the time he appears, and that the former proceedings are not thereby invalidated, and in this case no facts are presented to show that the protection of the corespondent in any way requires that there should be a new trial of the issues already disposed of.

It follows that the judgment appealed from should be affirmed, with costs.

LAUGHLIN and CLARKE, JJ., concurred; O'BRIEN, P. J., and McLAUGHLIN, J., dissented.

McLAUGHLIN, J. (dissenting):

I am unable to concur in the prevailing opinion. The issues raised by the answer of the corespondent had to be disposed of before judgment could be entered and this was not done.

The action was brought for an absolute divorce on statutory grounds. The defendant was alleged to have committed adultery with the corespondent here appealing and he was the only person mentioned as a corespondent in the complaint. Having appeared in the action, demanded and received from plaintiff's attorney before the entry of judgment a copy of the summons and complaint, and interposed an answer thereto denying the material allegations thereof, he had an absolute right under subdivision 2 of section 1757 of the Code of Civil Procedure to a trial of the issues, so far as the same affected him, before judgment could be entered. This subdivision of the section of the Code provides that in an action brought to obtain a divorce on the ground of adultery, the plaintiff or defendant may serve a copy of his pleading on the



App. Div.]

First Department, February, 1906.

correspondent named therein, and, at any time within twenty days after such service, the correspondent may appear to defend such action so far as the issues affect such correspondent. It also provides that if no such service be made, then at any time before the entry of judgment any correspondent named in any of the pleadings shall have the right at any time before the entry of judgment to appear in the action and demand of plaintiff's attorney a copy of the summons and complaint, which must be served within ten days thereafter, and he may appear to defend such action so far as the issues affect such correspondent.

The purpose of this statute is obvious. It is to enable a correspondent to intervene in the action and protect his or her reputation when the same might be injured or destroyed by collusion between the original parties to the action, or by false testimony given by one of them. The prevailing opinion either ignores or else overlooks the purpose of the statute and in effect repeals the statute itself. If a correspondent must accept the situation precisely as he finds it when he gets into the action, if a trial has been had, then there is no opportunity to defend the action so far as the issues relate to him, and this is well illustrated in the case now before us. Here the correspondent was the only one named in the complaint. A trial had been had upon issues framed, before a jury, which had found that the defendant had committed adultery with the correspondent. Upon these findings proceedings were about to be taken, for judgment. If the correspondent could only accept the situation as he found it, then the only issue which related to him had been tried and disposed of, viz., that he had committed adultery with the defendant.

It is true that a correspondent is not, in express terms, made a party to the action, but this is immaterial, inasmuch as he is allowed to appear and defend so far as the issues relate to him, and to this extent at least he must be considered as a party. Neither of the original parties to the action is obliged to bring him in, and if they do not, he is not obliged to come in, and cannot be compelled to do so. He, however, has a right to make himself a party to the action, and if he does so he must be regarded and treated as such, and before judgment can be entered the issues raised by an answer interposed by him must be disposed of. If he is unsuccessful in

his defense, then he may be required to pay costs. (*Billings v. Billings*, 73 App. Div. 69.)

It is no answer to the foregoing suggestions to say he should have appeared earlier in the action, because the statute gives him the right to appear at *any time* before the entry of judgment, and the plaintiff could have limited the time within which he could get into the action by serving the summons and complaint upon him without waiting to have the corespondent demand that such service be made.

The judgment appealed from, therefore, should be reversed and a new trial ordered, with costs to the corespondent to abide the event of the action.

O'BRIEN, P. J., concurred.

O'BRIEN, P. J. (dissenting):

I dissent from the views expressed by Mr. Justice INGRAHAM.

This is an action for divorce on the statutory grounds brought by a husband against his wife, in which he has thus far been successful, having obtained an interlocutory judgment awarding him an absolute divorce, from which separate appeals have been taken both by the wife and by the corespondent named in the complaint. The sole question raised by the briefs of the appellants on this appeal relates to the rights of the corespondent under subdivision 2 of section 1757 of the Code of Civil Procedure, and, therefore, it is only necessary for us to consider the scope and effect of that subdivision as applied to the facts before us.

The action was commenced in September, 1903, the complaint alleging that the defendant at various times during that year had committed adultery with one Theodore E. Lawton. The wife interposed an answer denying the adultery, and pursuant to an order of the Special Term the issues of fact raised by these pleadings were tried on February 5, 1904, before a jury, which found that the defendant had committed adultery with said Lawton during the year mentioned. At this trial the corespondent appeared and testified as a witness. Thereafter the case was brought on at Special Term, and in conformity with the verdict previously rendered at Trial Term an interlocutory judgment was entered in favor of the plaintiff granting him a divorce, which, however, was reversed on

App. Div.]

First Department, February, 1906.

appeal to this court (*Boller v. Boller*, 96 App. Div. 163) and the case was thereupon restored to the Special Term calendar.

This was the situation when the corespondent on March 25, 1905, through his attorney served by mail upon plaintiff's attorney a notice of appearance and a demand that a copy of the summons and complaint be served upon him. On March twenty-eighth the plaintiff complied with this demand, and on April seventeenth the corespondent served plaintiff with a copy of his answer, being a general denial as to him of the charge of adultery. When the case thereafter came on for hearing at Special Term on April nineteenth the corespondent moved to strike it from the calendar on the ground that he had received no notice of trial since the joinder of issue. Upon this subject it was shown by affidavit that at the time the plaintiff served upon the corespondent a copy of his summons and complaint, March twenty-eighth, he also served a notice of trial, stating that the action would be brought to trial on April eighteenth, but this notice was returned by the corespondent on the ground that it was served before he had answered and before issue had been joined as to him. Although no other or subsequent notice of trial had been given, the corespondent's motion to strike the case from the calendar was denied as was also his motion to have the issues of fact raised by his answer tried by a jury. The plaintiff thereupon and against the corespondent's objection was permitted to introduce in evidence the minutes of the previous trial before the jury and the record of the verdict finding that the wife had committed adultery with the corespondent. Notwithstanding the fact that the issues raised by the corespondent's answer had not been disposed of, and that he duly demanded a trial of those issues, the court, upon the record of the previous trial, awarded plaintiff his interlocutory judgment of divorce on the ground of adultery as found by the jury.

It is from this judgment that the separate appeals have been taken by the wife and the corespondent, and we are called upon to determine the rights of the latter under the circumstances above stated, whether, after having come into the action and served an answer denying his participation in the alleged adultery, he could be deprived of a trial of this issue of fact.

Subdivision 2 of section 1757 of the Code of Civil Procedure,

upon which the corespondent relies, provides that "In an action brought to obtain a divorce on the ground of adultery, the plaintiff or defendant may serve a copy of his pleading on the co-respondent named therein," who, "at any time within twenty days after such service \* \* \* may appear to defend such action, so far as the issues" affect him. The section further provides that "if no such service be made, then *at any time before the entry of judgment* any co-respondent named in any of the pleadings shall have the right, *at any time before the entry of judgment*, to appear either in person or by attorney in said action and demand of plaintiff's attorney a copy of the summons and complaint, which must be served within ten days thereafter, and *he may appear to defend such action, so far as the issues affect such co-respondent.*"

In approaching the consideration of this section it must be borne in mind that the Legislature, in the exercise of its authority to regulate marriage and divorce for the welfare of society and the State, may prescribe the procedure which must be observed in order to dissolve the marital relations or to secure the rights of one named as corespondent. The validity of the act is not attacked, there being here involved merely the question of its construction. It is our duty, therefore, to ascertain its meaning and scope, and then give it force and effect. If the language is clear and unambiguous, we cannot warp or twist its meaning because we think that a statute different in terms from the one enacted would be better suited to adjust the equities between particular litigants. The record before us undoubtedly shows that the present corespondent has been guilty of a long and vexatious delay in invoking the protection of the statute; and while his conduct does not commend itself to the court, nevertheless we have no power, for that reason, to deprive him of a right given by the law. The appellant Lawton knew that he was named corespondent in the complaint. He appeared as a witness before the jury when the issue of defendant's alleged adultery with him was tried. He made no attempt at that time to intervene, but on the contrary waited until all questions of fact raised by the complaint and answer had been determined in plaintiff's favor before he demanded an opportunity to be heard. He has resorted to dilatory tactics which we do not hesitate to condemn, but, conceding that to be so, he cannot be denied the right

App. Div.]

First Department, February, 1906.

conferred upon him by the statute, "at any time before the entry of judgment," to "appear to defend such action, so far as the issues affect" him as corespondent.

In defining the status of a corespondent under this section, the Appellate Division of the fourth department in *Billings v. Billings* (73 App. Div. 69) said through Mr. Justice WILLIAMS that he "is not, by the terms of the statute, called a defendant, but he is allowed to appear and defend the action, and may very properly be regarded as a party defendant from the time he appears and serves an answer to the complaint. He is not obliged to defend, and cannot be compelled to do so. His appearance is voluntary, but if he elects to come into the action he ought to be regarded and treated as a party defendant from that time." And by one of the judges of the first judicial district at Special Term it was said (*Riza v. Riza*, 35 Misc. Rep. 227) that "when a person is given the privilege of appearing and defending an action by express legislative enactment, he thereby becomes a party to such action, and as such becomes vested with all the rights and privileges of a party except as limited by statute."

By way of argument we may refer to section 452 of the Code, which although relating to a different subject, yet contains similar provisions, and by analogy throws light upon the question now presented. That section provides in part that "where a person, not a party to the action, has an interest in the subject thereof, or in real property, the title to which may in any manner be affected by the judgment, or in real property for injury to which the complaint demands relief, and makes application to the court to be made a party, it must direct him to be brought in by the proper amendment." That section was before the courts for consideration in *Wood v. Swift* (81 N. Y. 31) where certain parties had been brought in as defendants after the action had been referred, the evidence taken and the case finally submitted to the referee for his decision on the merits. The court, although granting the application bringing in the new parties, directed by its order that the case should remain and continue for trial before the referee, the same as if the new parties had been parties from the beginning of the action, they to have the privilege, however, of cross-examining the witnesses previously produced and examined before the referee. On

appeal, however, it was held that so much of the order as directed the case to continue before the referee with the right of cross-examination of witnesses was erroneous, Judge EARL saying that the court "could not compel" the new parties "to accept the referee who had been appointed, and to accept the evidence which had been taken, even with the right of cross-examination which was secured to them." And in further discussing the rights of the appellant, who was one of the new parties brought into the action, he said: "The action does not appear in the papers before us to be one which could be referred without consent. The appellant had the right to have the cause tried by the court or a jury, and he at least had the right to be heard as to the appointment of a referee, and he had the right to be present when the witnesses were sworn and examined."

It is true that section 452 provides that a person specified shall be made a *party* to the action, while subdivision 2 of section 1757 does not in terms so recite, but from the language used in the latter section we are of the opinion, as already indicated, that it was the purpose of the Legislature to give a corespondent the rights of a party to the action in so far as the issue of adultery affected him. Any other interpretation would render meaningless the words which permit him at any time before the entry of judgment to "defend" the action.

Nor do we find in the section language which either expressly or by implication confines a corespondent, as suggested in the opinion of Mr. Justice INGRAHAM, "to a defense of the undisposed of issues at the time he comes into the litigation." If it had been the intent of the Legislature to so limit a corespondent's rights, such limitation could have readily been expressed in the accurate and proper words used by the learned justice in his opinion, and the fact that no such words are found in the section itself is strong evidence that the Legislature did not intend to impose any such limitation. On the contrary, it seems to us that the Legislature intended, as suggested by Mr. Justice WILLIAMS in the *Billings Case* (*supra*), that a corespondent should be regarded as a party to the action in so far as the issue of adultery affected him with all the rights of a party.

If the plaintiff had desired to guard against vexatious delay caused by the belated application of the corespondent, it was within

App. Div.]

First Department, February, 1906.

his power to do so by serving a copy of his complaint upon the corespondent in the first instance as permitted by the section. This he did not do, so he is equally responsible with the corespondent for the present situation. A case may arise wherein a corespondent named in a divorce action may be outside the State and may be ignorant of its pendency until the issues involving his good name have been disposed of by the jury. Under such circumstances it would be unjust and contrary to the statute to deprive him of the opportunity to be heard in the action or to present evidence upon the issues so far as they affect him ; yet such a result would follow under the view taken by Mr. Justice INGRAHAM that a corespondent only has the right to defend such issues as may be undisposed of at the time he comes into the litigation. The statute is salutary and remedial and the reason for its enactment apparent. It was designed to prevent innocent parties from being charged with immorality and convicted without an opportunity of defending themselves. If it is to effect this purpose, as expressed by its language, which is clear and certain, it should be construed so as to extend to a corespondent the rights of a party to the action in so far as the issues affect him, and if everything that has taken place prior to his coming into the action is a sealed book which he is forbidden to open, the end sought by the statute cannot be accomplished.

I think, therefore, the court erred in refusing to the appellant the right to litigate the issues raised by his answer and in entering judgment while such issues were undisposed of.

The judgment appealed from should, therefore, be reversed and a new trial ordered, with costs to the appellant Lawton to abide the event.

Judgment affirmed, with costs. Order filed.

CATHARINE McLAUGHLIN, as Administratrix, etc., of JOHN McLAUGHLIN, Deceased, Respondent, v. MANHATTAN RAILWAY COMPANY, Appellant.

First Department, February 23, 1906.

**Negligence—employee killed by passing train on elevated track—assumed risk—contributory negligence—evidence—opinions of one not expert, inadmissible.**

The plaintiff's intestate, who had been for two months in the defendant's employ in repairing elevated tracks—one month on the particular line in question—while walking on a footway between two tracks, in recoiling from a train passing on one of them was struck and killed by a train passing on the other. The intestate was familiar with the locality. There was a normal clearance of twenty-nine and one-half inches between passing trains, and it was shown that the place was safe for those accustomed to it. There was an outside footpath five feet three inches wide which the intestate could have taken in going to his work, and in that case he would have been entirely out of danger.

Of his own volition he took the center walk knowing that trains were liable to pass, and there was no evidence that he looked to see whether trains were approaching or took any precaution to protect himself when they were passing.

*Held*, that a verdict for the plaintiff should be set aside;

That the risk was apparent and assumed;

That the intestate was guilty of contributory negligence;

That the defendant's foreman superintending the work was not an expert competent to give an opinion as to whether placing red flags at either end of gangs at work on such tracks would make the place a safe place in which to work.

The admission of such opinion is reversible error.

O'BRIEN, P. J., and CLARKE, J., dissented.

APPEAL by the defendant, the Manhattan Railway Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 17th day of May, 1905, upon the verdict of a jury for \$4,000, and also from an order entered in said clerk's office on the 15th day of May, 1905, denying the defendant's motion for a new trial made upon the minutes.

*J. Osgood Nichols*, for the appellant.

*J. Noble Hayes*, for the respondent.



App. Div.]

First Department, February, 1906.

McLAUGHLIN, J. :

On the 28th of November, 1902, the plaintiff's intestate was struck and killed by one of the defendant's trains, and she brings this action to recover the damages alleged to have been sustained upon the ground that his death was caused by defendant's negligence.

The accident occurred about eight o'clock in the morning, at a point a little south of the intersection of Seventy-sixth street and Columbus avenue, at which place the defendant maintains an elevated railroad structure, on which trains are operated. The intestate for about two months preceding the accident had been employed by the defendant in making certain repairs upon the structure—one month on this particular line, Sixth avenue. For two days immediately preceding the twenty-eighth he did not work, and this seems to have been taken by him as a sufficient ground for discharge, for on the morning of the accident he applied to the foreman in charge of the work (one Murphy) for reinstatement. Murphy at the time was upon the elevated structure, and he told the intestate he could go to work at any of the places south of there which had been designated by chalk marks as needing repairs. The repairs which were being made under Murphy's supervision extended from Seventy-sixth to Fifty-ninth streets. Between these points there are three tracks upon the structure. The north and south-bound local tracks are located respectively on the east and west side of the structure, and the express track is in the center. The distance between the nearest rails of the express and local tracks is six feet three inches. In the center of this space on either side is a board walk constructed of four six-inch boards, the width of which is sufficient to give a clear space of twenty-nine and one-half inches between parallel cars passing on both tracks, except under certain conditions, when the space might be narrowed three or four inches by the swaying of passing cars. Beyond the local tracks, on either side of the structure, there are also two board walks, each of the width of five feet three inches. Between the outside walk and the track extend handrails. These outside walks are used by workmen in going to and from their work, and there was some evidence that the walk between the tracks is also used for that purpose, as well as for workmen while at work, to escape from passing trains.

The intestate, after Murphy told him he could go to work, proceeded southerly on the walk between the express and the south-bound local tracks. There was a chalk mark indicating repairs were needed only a few feet from where Murphy stood (which was on this same walk), but he passed this and after going between 150 and 200 feet a local train overtook him and a little later an express. As the express train passed Murphy he called to the intestate to look out for it, and as he did so, to use Murphy's own language, the intestate "shied from the local and then came in contact with the step of the express." He was knocked down and instantly killed.

The plaintiff contended at the trial, and this contention seems to have been adopted by the trial court, that upon the facts a question was presented for the jury to say whether the defendant had performed the duty which it owed to the intestate, by furnishing him a reasonably safe and secure place to walk or stand upon between its tracks while the trains were passing and in notifying him of the approach of the trains and promulgating and enforcing reasonable rules and regulations with reference to the use of the walk and the operation of the trains. The jury found in favor of the plaintiff and defendant appeals.

I am of the opinion that the judgment is erroneous and should be reversed. The proof showed that upon the tracks at this point trains were passing and repassing every few minutes, indeed, at some hours of the day nearly every minute; that the intestate was familiar with this fact because he had been engaged upon the tracks at this point for nearly a month, during which time trains had passed hundreds of times. Indeed, the testimony of plaintiff's witness Murphy, who was not at the time of the trial in the employ of the defendant and had not been for upwards of two years, was to the effect that he had been caught between these trains as the intestate was at the time of the accident "lots of times, hundreds of times, every day," and that it was a safe place if the person knew what to do, that is, braced himself and stood sideways.

The intestate, in going to the place where he desired to work could have taken the walk on the outside of the tracks and in that case he would have been entirely out of danger from passing trains. He, however, of his own volition, took the center walk and when he did so he must have known that while upon that walk both the

App. Div.]

First Department, February, 1906.

express and local trains were liable to pass. He was, therefore obligated to look out for approaching trains, and there is not the slightest evidence in the record that after he started on this walk he looked to see whether a train were approaching or that he took any precautions to protect himself when the trains were passing; on the contrary, the only evidence is that when Murphy called to him, instead of turning sideways and allowing the trains to pass, he threw his body away from the local train and in doing so it came in contact with the express. Not only this, but when the intestate selected the center walk instead of the outside one, the risk of using the one selected was open and obvious to him, and, therefore, he assumed whatever danger there was in using it. This is but applying the general rule, which is that a servant when he accepts the service, does so subject to the risks incidental to it, and where the machinery, implements or structures of the employer's business are at that time of a certain kind or condition and a servant knows it he can make no claim upon the master to furnish different safeguards or appliances (*Sweeney v. Berlin & Jones Envelope Co.*, 101 N. Y. 520); that he assumed not only the risks incident to the employment but obvious dangers, and if he voluntarily enters into or continues in the service — having knowledge or means of knowing the dangers involved — he assumes the risk. (*Crown v. Orr*, 140 N. Y. 450; *De Graff v. N. Y. C. & H. R. R. Co.*, 76 id. 125; *Ryan v. Third Avenue R. R. Co.*, 92 App. Div. 306.)

No rule which could have been adopted by the defendant — unless it had stopped running its trains while the intestate was on his way to work — would have protected him. He knew what the situation was and he knew the danger which he was liable to encounter if the express and local passed him at the same time while he was upon this walk. The real cause of the accident was the failure of the intestate to notice the approach of the express train and probably when Murphy called to him he thought he was warning him of the local and for that reason he swerved in the opposite direction, and in doing so was struck by the express.

This being the condition of the evidence at the conclusion of the trial, it seems to me the court erred in denying defendant's motion to direct a verdict in its behalf, certainly in denying its motion to

set aside the verdict, because the intestate was not only guilty of contributory negligence but he assumed the risk of being injured by passing trains when he used the center walk instead of the outside one.

I am also of the opinion that the court erred in permitting the witness Murphy to answer the following questions: "Q. What do you say, from your experience as a workman and foreman working on the elevated railroad in regard to the security which would be afforded to workmen by having a rule requiring that all men working on the tracks upon which trains are run should work under a red flag or that a flagman should be stationed at either end of that gang of men, no matter how large or small it may be? \* \* \* A. You want my opinion of the rule? Q. Yes. A. I think it would be a very good idea. It would be safe for men that is working on the road. \* \* \* Q. Do you think, in view of your experience, that men can be properly protected from passing trains without such a uniform rule? A. Why, no." Appropriate objections were made to the questions as well as motions to strike out the answers thereto. The objections were overruled and the motions denied and exceptions duly taken. The witness was not an expert. There was nothing to indicate that he had particular skill in the management and operation of a railroad of this character. It was at most a mere expression of opinion or a guess upon his part that a rule of the kind and character of the one suggested might be "a very good idea," and that workmen could not be protected without such a rule. Manifestly such expressions or conclusions are not the evidence which the law requires in order to justify a verdict that a defendant has been remiss in its duty in not promulgating or enforcing a rule for the protection of servants in its employ.

Upon both grounds, therefore, I am of the opinion that the judgment and order appealed from should be reversed and a new trial ordered, with costs to the appellant to abide the event.

INGRAHAM and LAUGHLIN, JJ., concurred; O'BRIEN, P.J., and CLARKE, J., dissented.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

App. Div.]

Second Department, March, 1906.

SUSAN E. REARDON, as Trustee of IRENE J. WOERNER, and IRENE J. WOERNER, Respondents, v. CHARLES H. WOERNER, Appellant.

Second Department, March 2, 1906.

**Husband and wife — husband's contract for support after separation is enforceable — jurisdiction of Municipal Court of New York.**

The rule that the contract of a husband to support his wife made after a separation is enforceable was not altered by section 21 of the Domestic Relations Law providing that a husband and wife cannot contract to relieve the husband from his liability to support his wife.

An action on such contract is not necessarily in equity and the Municipal Court of the city of New York has jurisdiction.

APPEAL by the defendant, Charles H. Woerner, from a judgment of the Municipal Court of the city of New York, entered in the office of the clerk of said court overruling a demurrer to the complaint.

This was an action in the Municipal Court of the city of New York to recover installments which had become due on a contract by the defendant for the support of his wife.

The contract was made in 1904 after the separation of the husband and wife, and is the usual one through the intervention of a trustee for the wife. The husband agrees to pay ten dollars a week to the trustee for the support of his wife, and the trustee and the wife agree to save him harmless from any other claim or liability for the support of his wife.

The defendant demurred, *first*, on the ground that the complaint did not state facts sufficient to constitute a cause of action; *second*, that the court had no jurisdiction of the subject-matter of the action.

*Joab H. Banton*, for the appellant.

*W. Coleman Hughes*, for the respondents.

GAYNOR, J. :

It is too well known among us that such a contract has long been held to be valid to call for the citation of authority.

It has of late been held, however, in the case of *Carling v. Car-*

*ling* (42 Misc. Rep. 492) that the provision at the end of section 21 of the Domestic Relations Law (Laws of 1896, chap. 272), that "a husband and wife can not contract to alter or dissolve the marriage, or to relieve the husband from his liability to support his wife," changes the law and makes such a contract illegal, in that it may secure to a wife less than she might be able to get by going to law, and relieve the husband of his liability to that extent. I do not see how we can acquiesce in this view. Substantially the same provision is to be found in chapter 594 of the Laws of 1892, which amends the act of 1884 (Chap. 381) in relation to the rights and liabilities of married women, and such an effect was never claimed for it. It is quite manifest that the Legislature had no such intention.

The contention that only a suit in equity, and not an action at law, can arise upon the contract, and that the court below was without jurisdiction inasmuch as it has no jurisdiction of suits in equity, has no foundation.

The judgment is affirmed, with costs.

HIRSCHBERG, P. J., WOODWARD, JENKS and HOOKER, JJ., concurred.

Judgment of the Municipal Court affirmed, with costs.

---

THE STANDARD PUBLISHING COMPANY, Respondent, v. THE CITY OF NEW YORK, Appellant.

Second Department, March 2, 1906.

**Municipal corporations — Election Law construed — aldermen of city of New York empowered to designate newspapers to publish notices — when newspaper can recover for such publication under former designation not revoked.**

The power of the supervisors of a county to designate newspapers to publish notice of elections and the official canvass of elections under section 22 of the County Law was by section 1586 of the charter of the city of New York (as amended in 1901) transferred to the board of aldermen of said city and not to the board of elections.

App. Div.]

Second Department, March, 1906.

Hence, when a newspaper which was so designated by the supervisors of Queens county in 1899 has in 1904 published such election notices on the direction of the clerk of said county, and no other newspaper has been designated by the board of aldermen of the city of New York, such newspaper can recover from the city for publishing such notices.

APPEAL by the defendant, The City of New York, from a judgment of the County Court of Queens county in favor of the plaintiff, entered in the office of the clerk of the county of Queens on the 10th day of June, 1905, upon the decision of the court rendered after a trial before the court without a jury.

*Arthur C. Butts* [*John J. Delany* with him on the brief], for the appellant.

*F. H. Van Vechten*, for the respondent.

GAYNOR, J. :

Section 5 of the Election Law\* requires the Secretary of State to send to each county clerk in the State three months before each general election a notice of the day of election and of each office to be filled, and that each county clerk shall forthwith file and record such notice in his office and publish it once a week until election day "in the newspapers designated to publish election notices." It also requires such notice to be sent to the board of elections of the city of New York, but does not require such board to publish it.

In 1904 the county clerk of Queens county published such notice in the plaintiff's newspaper, and this action is to recover the legal compensation therefor.

Section 22 of the County Law makes it the duty of the supervisors of each county to designate two newspapers to publish such election notice and also the official canvass of elections, and to fix the compensation to be paid therefor. The appellant does not dispute that the plaintiff's newspaper was regularly designated in 1899 under the said section. That designation has continued unless another has been legally made. The board of elections of the city of New York assumed to designate other newspapers in July, 1904, and the question is whether it had power to do so.

By section 1586 of the city charter (as amended in 1901) all

---

\*See Laws of 1896, chap. 909, as amd. by Laws of 1901, chap. 232.—[REp.]

powers and duties of the boards of supervisors theretofore existing in any of the counties within the territory of the city (of which Queens is one), and not transferred to any administrative department, board or official of the city, were transferred to the board of aldermen. That board has never designated any newspaper to publish such election notice.

The appellant claims that the power of designation given to the supervisors by said section 22 of the County Law was transferred to the board of elections, but can point to no statute provision to that effect. It is claimed, however, that the general scheme of the Election Law and the city charter taken together accomplishes that result. But when such claim of legislative intention to concentrate all the powers and duties concerning elections in the city of New York in the board of elections is put to the test, it does not hold good. The county clerks of the several counties within the city limits have to receive and publish such notice under section 5 of the Election Law, as we have seen, and they also have to publish the final result of the election canvass (Elec. Law, § 136). Also, on March 4, 1904, the board of aldermen fixed the compensation to be paid for the publication of such notice, acting under the said section 22 of the County Law, thus evincing the understanding that it succeeded to that duty. And if to that why not to the other duty under the same section of designating the newspapers also? If the general scheme contended for exists, it ought to hold good at all points.

On reading the provisions of section 11 of the Election Law creating the board of elections and prescribing its powers and duties (as amd. by Laws of 1901, chap. 95, § 5), and also the like statute provisions in the city charters of 1882 and 1897 in respect of its predecessor, the bureau of elections, to whose powers and duties it succeeded (Laws of 1882, chap. 410; Laws of 1897, chap. 378), it will be found that while the power and duty of designating newspapers and publishing other notices are specifically given, they are not given in the particular here in dispute. And there are numerous powers and duties in respect of elections and the canvass of the votes not imposed on the board of elections.

To hold that the general provision of section 11 (subd. 2) of the Election Law, that the board of elections is charged with the duty of



App. Div.]

Second Department, March, 1906.

executing the provisions of law relating to all elections, "except as otherwise provided by law," imposes the duty here in dispute would, of course, be to beg the whole question.

It is true that under section 22 of the County Law the newspapers are not designated by the board of supervisors but by the members representing the two great political parties, each set designating one newspaper, in accordance with the practical interpretation of that section which prevails throughout the State. (*Matter of Ford*, 92 App. Div. 119.) But that duty is meant to be devolved on the board of aldermen by section 1586 of the charter, although that section only mentions in terms powers and duties of boards of supervisors. The construction must not be so strict as to defeat the intention.

The judgment is affirmed.

HIESCHBERG, P. J., WOODWARD, RICH and MILLER, J.J., concurred.

Judgment of the County Court of Queens county affirmed, with costs.

---

JOHN VON DER BORN, Respondent, v. ANTON SCHULTZ, Appellant.

Second Department, March 2, 1906.

**Res adjudicata** — when former judgment in summary proceedings in landlord's favor bars action by tenant to recover sums advanced on option to purchase.

When in an action by a former tenant to recover from his landlord sums alleged to have been paid under an option to purchase, which sums were to be returned or applied on the rent if the tenant elected not to purchase, it is shown that subsequent to the alleged payments the landlord obtained a judgment of dis-possession against said tenant in summary proceedings, the same is *res adjudicata* against the plaintiff's claim, as the alleged possession by the landlord of the plaintiff's money would have been a complete defense in said proceedings and was comprehended in the issues.

APPEAL by the defendant, Anton Schultz, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Queens on the 8th day of May, 1905, upon the verdict of a jury.

The action was to recover \$10,000 and interest alleged to have been paid by the plaintiff to the defendant in installments between February 1, 1895, and January 10, 1899, on an option to purchase real property of which he was tenant of the defendant.

On January 7, 1892, the defendant made a written lease to the plaintiff of real property in the city of New York for a term of twenty-one years from May first following at the rent of \$2,100 a year payable in equal monthly sums on the first day of each month. On February 1, 1895, the parties entered into a supplemental written agreement modifying the said lease, and giving to the plaintiff during the tenancy "the privilege to purchase the said premises so demised at any time before January 1, 1900," for \$35,000, by paying not less than \$7,000 in cash on taking title and giving back his bond and mortgage for the balance.

The complaint alleges that the plaintiff paid to the defendant various installments between the making of the said agreement and January 1, 1900, amounting to \$10,000, "with the express understanding and upon the express agreement that if plaintiff should not elect to purchase the said premises, then said sum of Ten thousand (\$10,000) dollars should be returned to plaintiff with 6 per cent interest thereon, or be applied upon the rent under the aforesaid lease." The plaintiff testifies that an oral agreement to this effect was made between them, and the defendant testifies to the contrary.

The complaint also alleges that the plaintiff did not elect to purchase in the time limited, and "that plaintiff thereupon, and in the year 1900 and also subsequently, demanded a return of the said sum of Ten thousand (\$10,000) dollars with interest, or in default thereof that the same be applied upon the rent to become due upon the said premises," and that the defendant refused either to return it or so apply it.

This action was brought in November, 1903, viz., after the lapse of nearly four years after the time of the purchase option had expired.

Other facts are stated in the opinion.

*Brainard Tolles* [*Garrard Glenn* and *George W. McAdam* with him on the brief], for the appellant.

*Robert C. Beatty*, for the respondent.

App. Div.]

Second Department, March, 1906.

GAYNOR, J. :

The defense in bar of a former adjudication was made out.

There is evidence by the plaintiff that after the purchase period had expired he spoke to the defendant about the \$10,000, and that he denied that he had received it or any sum of the plaintiff on the purchase option; but there is no evidence that the plaintiff made the demand for the return thereof or that it applied on the rent, which is alleged in the complaint. On the contrary, he testifies that he told the defendant that "we could take it out of the rent," and he repeats several times that he elected to have it applied on the rent. Moreover, his election was not necessary — indeed he had no right of election — for by the alleged oral agreement under which it was paid, as the plaintiff claims, it was to be held by the defendant and applied on the rent as it came due if the plaintiff did not take title under the purchase option, unless the defendant chose to pay it back with interest at six per cent.

This being the contract relation between the parties, the defendant showed that he had on January 4, 1901, in the Municipal Court of the city of New York, begun landlord and tenant proceedings under the statute to remove the plaintiff from the demised premises for non-payment of the rent which came due under the lease of November 1 and December 1, 1900, and January 1, 1901, and on due service of the precept on the plaintiff, and his appearance and consent on the return day, obtained a final order therein of removal, upon which a warrant was issued, but not executed because the plaintiff paid the rent in arrears, and he has continued in possession and paid the rent ever since.

This adjudication imports absolute verity, and is conclusive evidence that the plaintiff owed the defendant the rent alleged to be due in the petition, and that the defendant had the right to remove him for non-payment thereof, for that could not be the case if the defendant then had in his hands \$10,000 of the plaintiff which he held by contract between them for the payment of the rent as it came due. That would have been a complete defense, and was necessarily comprehended in the issue whether the plaintiff was in arrears for rent and could be removed therefor (*Nemetty v. Naylor*, 100 N. Y. 562; *Reich v. Cochran*, 151 id. 122; *Barber v. Kendall*, 158 id. 401; *Brown v. Mayor*, 66 id. 335).

Apart from the foregoing, a careful reading of the evidence shows that the case is a grave one for the consideration of a motion to set the verdict aside on the ground of the weight of evidence, and the suggestion by this court on that head when the case was here before (104 App. Div. 94) should be heeded.

The judgment should be reversed.

HIRSCHBERG, P. J., WOODWARD, RICH and MILLER, JJ., concurred.

Judgment reversed and new trial granted.

---

GEORGE HAYWOOD CARPENTER, Respondent, v. NEW YORK EVENING JOURNAL PUBLISHING COMPANY, Appellant.

First Department, February 23, 1906.

**Libel — false publication calling plaintiff “a rogues’ gallery man” — legal and express malice distinguished — proof of express malice essential to recovery of exemplary damages — erroneous charge.**

Published headlines referring to the plaintiff as “a rogues’ gallery man,” if false, establish the legal malice which entitles the plaintiff to compensatory damages.

But the mere publication of such libel does not entitle the plaintiff to exemplary damages, and in order to recover exemplary damage the burden is upon the plaintiff to establish express malice evidenced by (1) personal ill-will, or (2) such negligence and carelessness as to indicate a wanton or reckless disregard of the rights of others, or (3) being false, the words themselves must be of such character as impute a degree of wrongdoing which calls for punishment in addition to compensation.

In an action for libel on the words aforesaid it is error to refuse to charge that the plaintiff, in order to recover exemplary damage, must establish express malice by a fair preponderance of proof.

Legal malice and express malice, distinguished.

APPEAL by the defendant, the New York Evening Journal Publishing Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 2d day of February, 1905, upon the verdict of a jury, and also from an order entered in said clerk’s office on the 25th day of January, 1905, denying the defendant’s motion for a new trial made upon the minutes.

*Clarence J. Shearn*, for the appellant.

*Franklin Pierce* of counsel [*Dill & Baldwin*, attorneys], for the respondent.

CLARKE, J. :

This action has been twice tried. Upon the first trial the plaintiff had a verdict for six cents damages. This court, on appeal, set that verdict aside and granted a new trial (96 App. Div. 376). The facts are sufficiently set forth in the opinion of Mr. Justice HATCH then rendered, and it is unnecessary to restate them. Upon the second trial plaintiff had a verdict of \$10,000. The learned trial judge followed the decision of this court.

He charged that "as to the head lines 'Expelled juror is a rogues' gallery man,' I have stated that as to that part of the libel, it is wholly undefended. \* \* \* That is you must find for the plaintiff such damages as he sustained by the publication of the head lines 'Expelled juror is a rogues' gallery man.'" To that portion of the charge defendant's exceptions are not well taken. We held on the former appeal in regard to those words: "The court in submitting the case to the jury left it to them to say as a question of fact whether the statement was true or not. The submission in this aspect was unwarranted as it was conceded both on the trial and in the argument in this court that plaintiff's picture did not adorn the rogues' gallery, nor was any record of him found therein." The previous decision of this court upon that point was, and is, the law of this case, concluding the trial court and controlling us.

A serious point is, however, presented in relation to the burden of proof upon the question of exemplary damages. After charging the jury as to compensatory damages, the learned court proceeded: "Another kind of damages is denominated exemplary damages—vindictive damages, punitive damages—that is, damages which the jury may inflict upon a person guilty of publishing a libel, by way of punishment, to deter others from offending in like manner. And those damages are founded upon a finding that there was malice on the part of the defendant in publishing the libel. Malice may be implied where the publication is false, and malice may be found from evidence indicating malice; and the fact that the defendant published in another edition of the paper this matter or published

this matter in this edition of the Sporting Special, after having investigated and found the police record showed that those indictments had been dismissed and that the plaintiff had been discharged for this other offense charged against him, is evidence from which you may infer malice; that is in the nature of express proof of malice; and so of the testimony of the president of the plaintiff's company, Mr. Williams, and the plaintiff himself, that he informed the reporter representing the defendant, at the office of publication, that he had been exonerated, that those charges had been dismissed, that is evidence also from which you may infer that there was express malice; and for express malice you may impose upon the defendant such an amount of money, by way of punishment, as in your judgment the case requires or permits. There is no rule by which the court can state how you shall arrive at the amount of damages which you shall believe the plaintiff has sustained, either as to compensatory damages or exemplary damages. It is such an amount as a jury, acting upon their own judgment and exercising a sound discretion, shall find to be the true measure of compensation, or the amount which you shall find by way of punitive damages."

The appellant excepted "to that part of your Honor's charge in which you stated that malice may be inferred from the falsity of the \* \* \* publication, which statement was made by your Honor in connection with the rule laid down for awarding exemplary damages; the point of the defendant being that the only malice which may warrant exemplary damage is actual malice which the plaintiff has proved, and that legal malice inferred from falsity is not an element to be considered in awarding exemplary damages."

The appellant also offered the following requests to charge, which being refused, it duly excepted:

"That the burden of establishing the malice to warrant exemplary damages, is upon the plaintiff, and such malice must be established by a fair preponderance of the evidence. \* \* \*

"That in view of the testimony of the defendant's editor and reporters that the publication was not made maliciously, in order to warrant exemplary damages the plaintiff must establish by a fair preponderance of proof that the publication was made maliciously, or recklessly, or wantonly, or carelessly."

The defamatory publication at bar was unprivileged and libelous *per se*. I take it that the statement of the law of libel has been confused by the use of a single word to express different ideas. That is the word "malice." As an injured party may recover damages of several kinds, the basis for the granting of those damages, compensatory or exemplary, is made to depend upon the various meanings of that one word "malice." Hence the confusion. It is said that upon proof of the publication of defamatory matter, and of its application to the plaintiff, if it be unprivileged and libelous *per se*, the falsity of the article and the malice in its publication are presumed. Upon proof of publication and application the plaintiff may rest. With that proof and those presumptions he has made out his case, and is entitled to such sum as the jury may give by way of compensation for the injury inflicted. In order that the plaintiff may recover an additional sum called exemplary, punitive, vindictive damages, or smart money, by way of punishment of the offender, it must appear that the publication was the result of (1) personal ill-will, or (2) of such negligence and carelessness as to indicate a wanton or reckless disregard of the rights of others, or (3) being false, to be of such a character that the words themselves sufficiently establish the degree of wrongdoing which calls for punishment, in addition to compensation. To distinguish this phase of the action of libel from that which calls only for compensation, the unfortunate phrase of actual or express malice has been coined. Unfortunate, because malice is malice; there ought to be no difference between "express" and "implied," and our rich and flexible language ought to have been able to furnish apt words to express the several propositions. When a plaintiff demands damages beyond compensation something more is demanded of him than when he asks merely to be made whole. He must prove something to justify punishment by increased smart money for himself. The so-called implied malice and the implied falsity are enough to secure compensation. It seems that having obtained that they are *functus officio*. This statement is made upon the authority of cases which it is our duty to follow and not criticize.

In the leading case of *Samuels v. Evening Mail Association* (9 Hun, 288; *revd.*, 75 N. Y. 604, on the dissenting opinion below) the very question at issue was the right to exemplary damages. Mr.

Justice DAVIS in the dissenting opinion said: "The plaintiff in an action of libel gives evidence of malice whenever he proves the falsity of the libel. It becomes then, a question for the jury whether the malice is of such a character as to call for exemplary or punitive damages; and that question is not to be taken away from the jury because the defendant gives evidence which tends to show that there was, in fact, no actual malice." In that case the defendant had given such evidence and the majority of the court had held that the character of the publication alone gave no right to exemplary damages. The dissenting opinion proceeds: "When he gives no such evidence, it is the duty of the court to say to the jury that upon proof of the falsity of the libel, the plaintiff is entitled to exemplary damages in their discretion. \* \* \* But where he gives evidence tending to prove the absence of actual malice, then it is the duty of the judge to submit to the jury the question, as one of fact, whether such malice existed in the publication. \* \* \* In libel cases the falsity of the libel being proof of malice sufficient to uphold exemplary damages, the right to recover them in the discretion of a jury, rests in the very act done in the publication of the false libel."

In commenting upon that case, Mr. Justice INGRAHAM said in *Brandt v. Morning Journal Association* (81 App. Div. 188): "In that opinion stress seems to be laid upon the proof at the trial that the libel was false, and that it is only upon proof of its falsity that the jury are justified in finding express malice from the publication. I assume that what was intended here is, that the falsity of the libel must appear from all the evidence in the case. In an action for libel, the charge is presumed to be false unless the defendant justifies in his answer, in which case the burden is on the defendant to prove the truth of the libel; but whether the burden is on the plaintiff to show affirmatively that the libel is false before he would be entitled to have the jury find exemplary damages from the fact of publication alone, is not material in this case, as there was considerable evidence as to the truth of the facts charged; and the question as to whether there was proof sufficient to establish to the satisfaction of the jury that the libel was false, before they could find malice from the publication, is not raised by any exception to the charge, or requests to charge."



After this decision, the Court of Appeals again had occasion to examine the question, a doubt having been raised as to the effect of the decision of that court in *Krug v. Pitass* (162 N. Y. 160), and in *Crane v. Bennett* (177 id. 106) that learned court, upon a review of the cases, again announced the doctrine of the *Samuels* case. Judge MARTIN said: "The general rule is that in an action for libel, proof by the plaintiff tending to establish the falsity of the alleged libelous publication is evidence of malice; and if such evidence is introduced, a question for the jury is presented whether the malice is of such a character as to call for punitive damages, and that question is not to be withdrawn from them because the defendant gives evidence which tends to show that there was no actual malice. We think the foregoing rule is well established by the authorities of this State and elsewhere, and that it must be regarded as the true rule, notwithstanding any expressions found in other cases where the question was not necessarily involved, which may not be in consonance with it. The doctrine of any such cases will not be followed, but must be regarded as overruled, so far as they may be in conflict with this decision."

In the *Brandt* case, cited *supra*, and affirmed (177 N. Y. 544) on the authority of *Crane v. Bennett* (Id. 106), it was further said: "The plaintiff in an action of libel gives evidence of malice whenever he proves the falsity of the libel from which a jury can award exemplary damages. The plaintiff must prove malice. He may prove ill-will and a desire to injure on the part of the defendant. He may prove such reckless conduct in the publication of a serious charge against an individual as will indicate such a wanton and reckless disregard of the rights of others as will justify an inference of malice. But in all these cases it is malice that is to be proved, and the question is what evidence the jury are entitled to consider as proof of malice."

In *McMahon v. New York News Pub. Co.* (51 App. Div. 488) the trial court had charged: "This question as to whether exemplary damages are to be awarded here is one of fact, depending upon conflicting evidence, \* \* \*; depending on whether you believe this insertion was made recklessly, wantonly, carelessly, and in disregard of the truth or of the rights of the citizens who would be affected by an article of this kind." And further: "Before the jury can find

punitive damages \* \* \* they must find as a fact that the publication was wantonly and recklessly made, without due investigation into the truth of the publication already made of that libel." Said Mr. Justice McLAUGHLIN, "this was a correct statement of the rule of law applicable to the subject."

In *Warner v. Press Publishing Co.* (132 N. Y. 181) the court said: "The plaintiff gave evidence of malice when she proved the falsity of the libelous publication, and in the absence of evidence on the part of the defendant tending to show that it had neither the desire nor the intention to wrong her, it would have been the duty of the court to instruct the jury that the plaintiff might be awarded exemplary damages in their discretion. But testimony was adduced on the part of the defendant tending to prove the absence of actual malice on its part towards the plaintiff, which, taken in connection with the evidence of malice which the law imputed when the falsity of the libel was established, presented a question of fact whether malice existed in the publication. If found to exist, then in their discretion the jury could award exemplary damages."

The foregoing and many other cases settle the proposition that exemplary damages depend upon a finding of fact by the jury of express malice, evidenced by the falsity of the libel, or the ill-will of the publisher, or the wanton and reckless publication.

In *Krug v. Pitass* (*supra*) it was said that express malice does not become an issue when the article is libelous on its face, unless punitive damages are claimed. If then it is made an issue by the plaintiff, if the plaintiff's recovery of such damages depends upon such finding of fact, he must sustain such burden, as in all civil cases, by a fair preponderance of the evidence. In the case at bar the question of the truth of the publication was vigorously fought out, and as a justification the jury were properly instructed that the burden of proof was on the defendant. There was also evidence as to investigation, effort to find the facts, belief in what was discovered, and absence of ill-will towards the plaintiff. Under the circumstances, then, an issue of fact was presented, upon the determination of which depended the damages. The court said: "And those damages are founded upon a finding that there was malice on the part of the defendant in publishing the libel;" and proceeded to

App. Div.]

First Department, February, 1906.

instance certain facts as "evidence from which you may infer malice;" but refused the request of the defendant "that the burden of establishing the malice to warrant exemplary damages is upon the plaintiff, and such malice must be established by a fair preponderance of the evidence;" and also "that in view of the testimony of the defendant's editor and reporters that the publication was not made maliciously, in order to warrant exemplary damages, the plaintiff must establish by a fair preponderance of proof that the publication was made maliciously, or recklessly, or wantonly, or carelessly."

We think the defendant was entitled to the charge requested, and in view of the nature of the case, the character of the evidence, and the size of the verdict, we are not able to say that it suffered no harm by this refusal.

The judgment and order must be reversed and a new trial ordered, with costs to the appellant to abide the event.

O'BRIEN, P. J., INGRAHAM, LAUGHLIN and HOUGHTON, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event. Order filed.

---

SELMA WALLACH, Appellant, v. THE NEW YORK AND HARLEM RAILROAD COMPANY and THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respondents.

First Department, February 23, 1906.

**Real property**—injury to real estate by elevated railroad viaduct not *damnum absque injuria*.

The injury to adjoining property caused by the heightening of an embankment railroad viaduct in the city of New York, pursuant to Laws of 1892, chapter 339, as amended, is not *damnum absque injuria*, and it is error to dismiss the complaint in an action for injunction and damages by the owner of such adjoining property on the grounds aforesaid.

APPEAL by the plaintiff, Selma Wallach, from a judgment of the Supreme Court in favor of the defendants, entered in the office of

APP. DIV.—VOL. CXI. 18

the clerk of the county of New York on the 7th day of July, 1902, upon the decision of the court, rendered after a trial at the New York Special Term, dismissing the complaint upon the merits.

*James C. Bushby* of counsel [*Bushby & Berkeley*, attorneys], for the appellant.

*Alexander S. Lyman* of counsel [*Ira A. Place*, attorney], for the respondents.

CLARKE, J.:

This action was brought for an injunction and damages with reference to the plaintiff's premises known as No. 1505 Park avenue, situated on the east side of said avenue, distant seventy-five feet eight inches southerly from the southerly side of One Hundred and Tenth street in the city of New York, by reason of the changes in the viaduct railroad structure of the defendants, carried out under the provisions of chapter 339 of the Laws of 1892 and amending acts. The judgment was entered July 7, 1902, upon a decision filed June 28, 1902. The learned trial court stated in the decision: "Pursuant to chapter 339 of the Laws of 1892, the stone embankment upon which the defendants' railroad in Park Avenue was previously operated was increased in height about eleven feet, and since February 16, 1897, the defendants have operated their railroad upon said embankment, increased in height as aforesaid. The work done in Park avenue pursuant to chapter 339 of the Laws of 1892, and the maintenance of said embankment at said increased height, and the operation of the defendants' railroad thereon since February 16, 1897, have caused damage to the plaintiff's said premises, over and above the damage caused by the said railroad as the same was maintained and used prior to 1892; but all of said damage comes within the legal principle of *damnum absque injuria*, and no one of the defendants is liable therefor;" and judgment was entered thereon dismissing the complaint on the merits and with costs. For this decision the court had the direct and controlling authority of *Fries v. New York & Harlem R. R. Co.* (169 N. Y. 270), decided in December, 1901. But the doctrine of the *Fries* case was overruled in *Muhlker v. Harlem Railroad Co.*, (197 U. S. 544); and in *Sander v. State of New York* (182 N. Y.

400) Chief Judge CULLEN said: "But on appeal to the Supreme Court of the United States, the *Muhllker* case, with several others which followed that decision, was reversed, the Supreme Court holding that under the decisions of this court in the elevated railroad cases, abutting owners had special easements in a street, an invasion of which by the erection of a viaduct, without compensation for such invasion, was taking property without due process of law in contravention of the Federal Constitution.\* Of course, with the decision of the Supreme Court in the *Muhllker* case, our own decisions in the cases cited have ceased to be authorities."

It follows, therefore, that the judgment should be reversed and a new trial granted, with costs to the appellant to abide the event.

O'BRIEN, P. J., PATTERSON, INGRAHAM and LAUGHLIN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event. Order filed.

---

M. LINDHEIM & COMPANY, Respondent, v. CENTRAL NATIONAL REALTY AND CONSTRUCTION COMPANY and JOHN V. SIGNELL, Appellants.

First Department, February 23, 1906.

**Lis pendens** — right thereto determined by complaint — when cancellation of lis pendens refused — merits of action not determined on motion to cancel lis pendens.

Though a real estate broker who has rendered services in effecting an exchange of lands is not entitled to a lien thereon, yet when the complaint of such broker, suing his principal and the grantee of the principal for commissions, sets out that the premises by express agreement were to be subject to the rights of the plaintiff, and that certain conveyances of the property were without consideration and void as against the plaintiff, and in pursuance of a scheme to defraud him, etc., and the relief asked is that the plaintiff be declared to have a lien, and that the un conveyed property be sold, etc., such complaint, good or bad on the merits, sets out an action to recover a judgment affecting the title to real property.

---

\* See U. S. Const. art. 1, § 10, subd. 1; Id. 14th amendt. § 1:— [REP.]

Hence, the right to a *lis pendens* is absolute, and the same cannot be canceled except pursuant to section 1674 of the Code of Civil Procedure.

If the complaint sets out such cause of action the merits thereof cannot be determined on a motion to cancel a *lis pendens*.

APPEAL by the defendants, the Central National Realty and Construction Company and another, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 15th day of January, 1906, denying the defendants' motion to cancel the notice of pendency of action herein.

S. S. Myers of counsel [*J. Charles Weschler* with him on the brief], for the appellants.

*Charles Strauss*, for the respondent.

CLARKE, J. :

Section 1670 of the Code of Civil Procedure provides that "in an action brought to recover a judgment affecting the title to or the possession, use or enjoyment of real property \* \* \* the plaintiff may \* \* \* file in the clerk's office of each county where the property is situated a notice of the pendency of the action \* \* \*."

An analysis of the complaint discloses that the defendant Signell, being the owner of a certain piece of real estate in the borough of Manhattan, desired to exchange said property for certain lots in the borough of Brooklyn, and, in consideration of plaintiff's rendering its services in bringing about said exchange, Signell agreed to pay it certain sums on the signing of the contract, on the passing of the title, and on the sale of the acquired lots at or above certain fixed amounts. The exchange was effected, and subsequently thereto Signell incorporated and organized the defendant Central National Realty and Construction Company, which took the title. Certain transactions by way of mortgage, exchange, sale and building construction took place, and an agreement was made, reciting the former agreement between plaintiff and Signell, in which the company agreed to pay to plaintiff certain sums at certain times from the net proceeds of the operations, and a careful method for ascertaining those proceeds was set out, and the agreement was that upon the

first \$10,000 being realized plaintiff should receive \$1,600; after the first \$10,000 have been realized plaintiff should receive twenty-five per cent until an additional \$10,000 had been realized, and, that after \$20,000 had been realized, plaintiff should receive fifty per cent of the net balance.

Plaintiff has made frequent use of the phrase "joint enterprise or adventure." The facts are not to be established by mere characterization. Plaintiff's services were evidently those of a broker, and its claim is for payment therefor. It brought about an exchange of property between owners thereof, and for that service one of them agreed to pay it at an agreed time an agreed sum. It had no title or interest in either of the properties. It acquired neither a vendor's nor a vendee's lien. It does not profess to have acquired any title to the property, to have expended any money thereon or to be entitled to any use or possession thereof. Its sole claim is to a certain sum from the realized net proceeds of sale thereof, after the deduction of all moneys with all interest thereon actually expended by the company in improving the properties, in carrying them, in paying off any mortgages upon them, or any taken in exchange, and all moneys actually expended in effecting exchanges and in acquiring and making sales.

I do not understand that a broker acquires a lien upon real property, the sale or exchange of which he has negotiated, for his fees, nor that such an interest is produced by an agreement to pay his fees out of the net proceeds after realization. It does not seem that he has a right to have the property sold for such purpose at his will, nor that the court could sell it at his instance. It may be that, as to the proceeds, he has a right to have the amount thereof determined and his share ascertained, and in such case would have the right to test the good faith of the sales and to establish the actual amounts realized thereon. The difficulty is, however, that on a motion to cancel a *lis pendens* we are not authorized to look into the facts as upon a trial, nor to search the complaint as upon a demurrer.

In *Mills v. Bliss* (55 N. Y. 139) the court said: "Whether the action can be sustained is not a question to be passed upon on this appeal. The plaintiff may fail to prove the facts alleged, or the court may hold that the action is untenable upon the facts stated. \* \* \*

The questions of fact as well as of law must be disposed of upon the trial and hearing of the cause. They cannot be determined upon an interlocutory motion. That the action upon the theory upon which it is brought and upon the complaint as framed does affect the title to real property, asserting as it does a legal and equitable right to a lien thereon, cannot be questioned, and upon the face of the complaint the notice of *lis pendens* was properly filed."

In *Brainerd v. White* (12 Abb. N. C. 407) the court said: "In this present case, if the motion had been granted, it would have been in consequence of the defendant contending that the plaintiff had not legal right to have the real estate charged, and of the court so holding. That would have been a determination of the plaintiff's cause of action against him. \* \* \* The matter cannot be heard upon motion. Under section 1670 the nature of the judgment which the action is brought to recover, is the description of the action in which a notice of *lis pendens* may be filed, and not the validity of the cause of action as described by the complaint."

In *Brox v. Riker* (56 App. Div. 391) Mr. Justice INGRAHAM said: "I think it must be apparent that upon a motion of this character the court cannot determine whether or not the action is well brought, or critically examine the complaint to see whether a demurrer to it would be sustained. If the object of the action is to recover a judgment specified in section 1670 of the Code, the court has no power to cancel the notice of pendency of action because it would be of the opinion from the allegations of the complaint that the action could not be maintained for that purpose. Where, however, the action is brought for an entirely different purpose than that specified in this section of the Code, having no possible relation to real property and where there are no allegations in the complaint which would bring the action within the class of those which affect the title to real property, a mere demand for a judgment which is entirely foreign to the cause of action alleged would not justify the plaintiff in filing the notice. Whether or not the action is brought to recover a judgment affecting the title to real property must be determined by the allegations of the complaint, and if no fact is alleged which would justify such a judgment and where the complaint as a whole shows that the action is brought



merely to enforce a personal obligation of the defendant which has no relation to the real estate described, it would seem to be clear that such an action is not one brought to recover a judgment affecting the title to real property."

In *St. Regis Paper Co. v. Santa Clara Co.* (62 App. Div. 538) there was a motion made to cancel the *lis pendens*. The court upon a prior appeal in the same case (55 App. Div. 225), where the question of the injunction was under consideration, had said: "This contract is one relating solely to chattels and in no sense is it a contract relating to realty," and very strongly intimated that the action could not be maintained, and thereafter the trial court had dismissed the complaint. (34 Misc. Rep. 428.) The plaintiff, however, had appealed. (See 66 App. Div. 617; *revd.*, 173 N. Y. 149.) Mr. Justice KELLOGG, speaking for the Appellate Division of the third department (62 App. Div. 540), said: "If the complaint discloses the clear purpose to be the recovery of a judgment affecting real property, its use, possession or enjoyment, the right to file a *lis pendens* is assured by section 1670. \* \* \* The contest over all the matters set forth in the complaint, as also over the sufficiency of the complaint or of the facts therein stated or of the right to maintain the action, must be all fought out in the action itself. \* \* \* It is only where it is apparent from the complaint that the action is *not* 'brought to recover a judgment affecting the title to or the possession, use or enjoyment of real property;' that is, that such is not the *purpose* of the action, that a court on motion may direct the cancellation of the record of the notice on grounds other than those prescribed in section 1674," and the motion was denied.

So, in the case at bar, looking into the complaint as drawn, the *purpose* of it was to procure a judgment affecting the title to real estate. It alleges that the transfers were in the agreement itself, subject to "the express arrangement that the premises were subject to the rights of the plaintiff under the said agreement of July 24th, 1902;" that certain conveyances were "without consideration and void as against this plaintiff, in fraud of its rights, and (were) a trick and device \* \* \* by which \* \* \* said defendants attempted to divest itself\* of its\* property and put the same out of the reach of this plaintiff and to reserve for its\* own benefit and

---

\* *Sic.*

use property which would otherwise be applicable to the payment of the net amount due the plaintiff under said joint enterprise or adventure;" and further that they intend by this same trick and device to get rid of the remaining properties now standing unconveyed of record in the name of the Central National Realty and Construction Company and defraud the plaintiff of its rights unless the court comes to the equitable aid of the plaintiff. The judgment demanded is that the rights and interests of plaintiff in the property unconveyed may be ascertained and settled, the property sold under the direction of the court, the proceeds divided in accordance with the agreement, "and that the plaintiff be declared to have a lien in its favor for such amounts as it may be entitled to;" that the defendants account for any and all property which came into their hands under said joint enterprise or adventure as well as the value or proceeds thereof, and that an injunction issue against their disposing of said real property.

It thus appears that, whether the complaint be good or bad, the purpose of the action is to have a lien upon real property declared and enforced, and, therefore, the action is brought to recover a judgment affecting the title to, or the possession, use or enjoyment of, real property. Being so, the right to file the *vis pendens* was absolute; not resting in the discretion of the court, but conferred by statute, and having been properly filed, it cannot be canceled except pursuant to section 1674 of the Code of Civil Procedure. (*Beman v. Todd*, 124 N. Y. 114.)

The order should be affirmed, with ten dollars costs and disbursements.

O'BRIEN, P. J., PATTERSON, INGRAHAM and LAUGHLIN, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements. Order filed.

App. Div.]

First Department, February, 1906.

In the Matter of the Judicial Settlement of the Final Account  
of J. MONTGOMERY STRONG, as Executor, etc., of ELIZABETH L.  
STRONG, Deceased, Appellant.

GEORGE M. WRIGHT, as Assignee for the Benefit of Creditors of  
ALBERT B. HILTON, Respondent.

First Department, February 23, 1906.

**Executors — decree that executor owes debt to estate conclusive — contempt of executor in refusing to pay — burden on executor to show insolvency.**

A decree that an executor owes a debt to an estate and directing him to pay the same is, by virtue of sections 2714 and 2552 of the Code of Civil Procedure, conclusive that he has money in his hands, and, on his refusal to pay, payment may be compelled by contempt proceedings under section 2555 of the Code of Civil Procedure.

In such contempt proceedings the burden is on the executor to show his insolvency, and when he has set up no such defense while contesting his liability to the estate or on successive appeals from the decree, and where his affidavits in answer to a motion to adjudge him to be in contempt do not show that he is unable to pay, an order adjudging him to be in contempt will be sustained.

If insolvent, he may be relieved from imprisonment under section 2286 of the Code of Civil Procedure.

APPEAL by J. Montgomery Strong, as executor, etc., of Elizabeth L. Strong, deceased, from a decree of the Surrogate's Court of the county of New York, entered in said Surrogate's Court on the 3d day of April, 1905, adjudging him in contempt.

*William R. Adams*, for the appellant.

*James S. Darcy* of counsel [*Russell & Holmes*, attorneys], for the respondent.

CLARKE, J.:

Testatrix died March 20, 1895. Letters testamentary were issued to the executor here proceeded against in February, 1898. A proceeding to compel the executor to account was initiated by his brother in August, 1898. The main question litigated in said proceeding concerned the personal liability of the executor for a debt due from him to his testatrix. After a long and expensive trial before a referee a

report was made establishing the debt, which report was confirmed and a decree was made on March 30, 1903, which included the debt as the principal asset of the estate. The decree, after stating the executor's account, found "a balance in his hands of \* \* \* \$4,501.55;" and directed the executor to pay, "out of the balance so found as above remaining in the hands of said executor," to the respondent creditor herein the amount of his claim, viz., the sum of \$2,270.19, and the further sum of \$219.95 out of the distributive share of Mary L. Spencer, a daughter of testatrix, who had contested the claim of said creditor, making the sum total due the creditor under said final decree, \$2,490.14. The said executor appealed to this court from said decree, and the decree was affirmed (90 App. Div. 607).

A copy of the decree was duly served upon the executor, a demand for payment made, and an execution issued. The executor having refused to pay, and the execution having been returned unsatisfied, this proceeding to punish him as for a contempt was commenced by an order to show cause dated December 7, 1904. Upon the return to this order, the executor for the first time, and after all these years of continued litigation, set up that "since his appointment as executor, and since the entry of the decree herein, (he) has not had the money with which to pay the amount directed in said decree, and is insolvent, and has been ever since his appointment as executor." For this reason he prays that he be not adjudged in contempt.

It is provided in section 2714 of the Code of Civil Procedure that "the naming of a person executor in a will does not operate as a discharge or bequest of any just claim which the testator had against him; but it must be included among the credits and effects of the deceased in the inventory, and the executor shall be liable for the same, as for so much money in his hands at the time the debt or demand becomes due, and he must apply and distribute the same in the payment of debts and legacies, and among the next of kin, as part of the personal property of the deceased." By section 2552 of said Code it is provided that "a decree directing payment by an executor \* \* \* to a creditor of, or a person interested in, the estate or fund \* \* \* is, except upon an appeal therefrom, conclusive evidence that there are sufficient assets in his hands to satisfy the sum which the decree directs him to pay." Section 2555 of

App. Div.]

First Department, February, 1906.

said Code provides for enforcing a decree of the surrogate directing the payment of money by an executor, from the estate, by contempt proceedings. So that the debt owing the testatrix is declared to be money in the executor's hands, the final decree is declared to be conclusive evidence that there are sufficient assets in his hands to pay the sum decreed, and if he does not pay, he is liable as for a contempt.

In *Baucus v. Stover* (89 N. Y. 1) the Court of Appeals said: "We perceive no room for doubt; the statute\* says the debt shall be treated as money, and the courts have no right to say it shall not be so treated." But the court also said: "While the debt must be treated as money in (the executor's) hands for the purpose of administration it will not, for all purposes, stand on the same footing as if he had actually received so much money. If wholly unable to pay the money in pursuance of the order or decree of the surrogate on account of his insolvency, he cannot be attached and punished for contempt as he could be if the money had actually been received from some other debtor."

In *Baucus v. Barr* (45 Hun, 582; *affd.*, 107 N. Y. 624), in an action upon the bond of the same executor as in *Baucus v. Stover* (*supra*), for his failure to comply with a decree, it was held that if his sureties could show the insolvency of the executor, they would not be held liable for the breach of the bond.

In *Keegan v. Smith* (60 App. Div. 168) an action was brought by the next of kin of decedent upon the bond of her administrator. A decree of the surrogate charged the administrator with his debt due to the intestate. The defendant claimed that the administrator being insolvent and not being able to pay the debt, the surety was not liable. The court below did not pass, in terms, upon the question whether the administrator was insolvent, but did find that he had been charged with his debt by the surrogate in the decree rendered against him, and as a conclusion of law found that the administrator having been charged with these amounts, the surety was liable for his failure to pay. This court, after citing *Baucus v. Stover* and *Baucus v. Barr* (*supra*), said: "When, therefore, an action is brought against a surety upon his bond after the return of an execution unsatisfied, all that it is necessary for the plaintiff to do is to prove the decree of the surrogate in the proper way, and

---

\*See 2 R. S. 84, § 18, revised in Code Civ. Proc., § 2714.—[REp.]

the other essentials necessary to charge the surety, and if the surety seeks to relieve himself from the liability which is *prima facie* imposed upon him, the duty is upon him to show that although presumptively the administrator is chargeable with the debt as for so much money in his hands, and has been so charged in the decree, yet, as a matter of fact, he cannot pay it and he is not guilty of a default, and that, therefore, the surety is not liable. \* \* \* The burden of the proof was upon the surety. The decree was conclusive upon him, and he was liable for the default of the administrator, unless he showed that the administrator was unable to pay and consequently unable to perform the decree of the surrogate as directed. If he desired to prove that fact he must obtain a finding, and unless there was a finding in that regard, there was nothing to excuse him from his liability upon the decree of the surrogate." In that case the trial court did not make a finding that the administrator was able to pay the debt, but this court said: "Such a finding was not necessary to sustain the judgment, but if it had been, the rule is settled that the evidence may be referred to, to see whether there was sufficient proof to warrant it, although it was not made; and if there is sufficient the judgment will be sustained, although the finding is not actually made by the court. \* \* \* But while the court is at liberty to examine the evidence to see whether there was sufficient proof to sustain the decision, it is not at liberty to examine the evidence to see whether there was testimony to supply a finding to reverse the judgment."

Applying those propositions to the case at bar, it is clear that the decree was conclusive upon the executor that the money was in his hands, and upon proof of default the case was made out and the order followed, unless the executor sustained the burden of showing his inability to pay. There is no finding in the order either way. It was not necessary that there should be a finding that he was unable to pay; but if there were such necessity, we are authorized to look into the evidence for the purpose of seeing whether there is enough to sustain such a finding. Looking into the affidavits upon both sides and weighing the circumstances disclosed, we are of the opinion that the executor has not sustained the burden of showing his financial inability. The fact that he made no such claim during the long years of the protracted litigation conducted by him, his

App. Div.]

First Department, February, 1906.

mode of life and the paucity of facts to sustain the conclusions set up by him, taken with the facts set forth by the moving party, satisfy us that the order of the surrogate was proper.

If as matter of fact the executor is really unable to pay the amount imposed as a fine for his default, the provisions of section 2286 of the Code of Civil Procedure may be invoked. That section provides that "where an offender, imprisoned as prescribed in this title,\* is unable to \* \* \* pay the sum \* \* \* required to be paid \* \* \* in order to entitle him to be released, the court \* \* \* may in its \* \* \* discretion, and upon such terms as justice requires, make an order directing him to be discharged from the imprisonment."

The order appealed from should be affirmed, with costs.

O'BRIEN, P. J., PATTERSON, INGRAHAM and LAUGHLIN, JJ., concurred.

Order affirmed, with costs. Order filed.

---

In the Matter of the Application of THE COMMISSIONER OF PUBLIC WORKS OF THE CITY OF NEW YORK, for and on Behalf of THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Relative to Acquiring Title in Fee to Certain Pieces or Parcels of Land Between East One Hundred and Twenty-fifth Street and First Avenue and the Harbor Commissioners' Line of the Harlem River, and Between the Southerly Line of One Hundred and Thirty-second Street and Willis Avenue and the Southerly Line of One Hundred and Thirty-fourth Street and Willis Avenue, etc., for the Construction of a Bridge Over the Harlem River, etc., Pursuant to the Provisions of Chapter 147 of the Laws of 1894.

THE CITY OF NEW YORK, Appellant; MARY ANN PALMER DRAPER and Others, Respondents.

First Department, February 9, 1906.

**Municipal corporations—condemnation proceedings for street opening in city of New York—no appeal from order of Special Term sending back report to commissioners for correction.**

The amendments made in the Street Opening Law by section 988 of the charter of Greater New York, expressly allowing an appeal to the Appellate Division

---

\* Code Civ. Proc. chap. 17, tit. 8,—[REfer,

by the city or any party aggrieved by the report of the commissioners of estimate on condemnation proceedings for the opening of streets "when confirmed," relate to matters of practice only, and hence allow an appeal from an order confirming such report in a condemnation proceeding instituted before the passage of said amendment.

But said section is confined in its operation to such report when *confirmed* by the Special Term, and there is no appeal authorized from an order of the Special Term refusing to confirm the report of said commissioners and sending the same back with directions requiring a further report in accordance therewith. Local statutes cited and construed.

APPEAL by The City of New York from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 3d day of March, 1904.

*John P. Dunn* [*Thomas C. Blake* with him on the brief], of counsel; *John J. Delany*, *Corporation Counsel*, for the appellant city.

*John C. Shaw*, for the respondent Draper.

*James A. Deering*, for the respondents Swift.

*George Holmes* of counsel [*DeForest Brothers*, attorneys], for the respondents Johnston.

CLARKE, J.:

This is an appeal by the city of New York from an order of the Special Term of the Supreme Court denying the motion to confirm the second partial and separate report of commissioners of estimate, and returning said report to said commissioners with certain directions, and for a further report in accordance therewith. It is claimed that said order is not appealable.

These proceedings were instituted on the petition of the commissioner of public works in behalf of the mayor, aldermen and commonalty of the city of New York, pursuant to chapter 147 of the Laws of 1894, entitled "An act to provide for the construction of a bridge over the Harlem river in the city of New York."

Section 4 of said act authorizes the commissioner of public works, with the consent and approval of the board of estimate and apportionment, and on behalf of the city, to acquire title in fee to any land which he may deem necessary for the purpose of



App. Div.]

First Department, February, 1906.

the construction of the bridge and approaches, and provides that "the provisions of law relating to the taking of private property for public streets or places in the said city are hereby made applicable as far as may be necessary to the acquiring of the said land as aforesaid. \* \* \*." The awards to be made for these lands and the expense of the condemnation proceedings are by section 4 of the act made part of the expense of the construction of the bridge, which, under section 3 of the act, is to be borne by the city. The latter section has been amended by chapter 607 of the Laws of 1901.

By an order of the Special Term, dated December 31, 1895, commissioners of estimate were appointed to perform the duties required of them by law. During the progress of the proceedings the Legislature passed chapter 664 of the Laws of 1897, amending section 4 of the act of 1894, under which the proceedings were commenced, but no change was made in the provision above cited as to the procedure of the commissioners of estimate under the so-called street opening laws. The taking of testimony commenced March 2, 1896, and the report of the commissioners was dated March 3, 1899. Thereafter, by order of the Special Term, the report was referred back to the commissioners with certain directions, and they again reported in accordance with those directions under date of October 29, 1901. The order appealed from is dated February 25, 1904. The first Greater New York charter, by its terms, took effect upon the 1st day of January, 1898. The revised charter went into effect January 1, 1902. To determine this question of appealability it becomes necessary, therefore, to consider what were the provisions of law governing street opening proceedings at the time of the passage of chapter 147 of the Laws of 1894, authorizing the construction of the bridge, and as now existing.

The law governing the opening of streets in the city of New York (Revised Laws of 1813, chap. 86, § 177 *et seq.*) has been upon the statute books with substantially the same provisions for upwards of ninety years, was embodied in the Consolidation Act (Laws of 1882, chap. 410, § 963 *et seq.*) and continued in the Greater New York charter (Laws of 1897, chap. 378, § 970 *et seq.*), and the revised charter (Laws of 1901, chap. 466, § 970 *et seq.*). In many proceedings to acquire private property for public uses

not coming strictly within the provisions as to "streets, avenues, squares or public places," the laws authorizing such proceedings have provided that the said proceedings should be conducted in the manner prescribed in and subject to the provisions of said law. It may be said that such law was the local law of condemnation for such purposes in the city of New York. Section 990 of the Consolidation Act—drawn from section 178 of chapter 86 of the Revised Laws of 1813—as amended by section 12 of chapter 660 of the Laws of 1893, and in force at the time of the commencement of the proceedings herein, provided that "The application for the confirmation of the report shall be made to the Supreme Court at a term thereof held in the city of New York. \* \* \* The said court shall by rule or order, after hearing any matter which may be alleged against the same, either confirm the said report or refer the same to the same commissioners for revisal and correction or to new commissioners to be appointed by the said court to reconsider the subject-matter thereof, and the said commissioners to whom the said report shall be so referred shall return the same report corrected and revised, or a new report to be made by them in the premises to the said court without unnecessary delay; and the same, on being so returned shall be so confirmed or again referred by the said court in manner aforesaid, as right and justice shall require, and so from time to time until a report shall be made or returned in the premises, which the said court shall confirm; and such report when so confirmed by the said court, shall be final and conclusive, as well upon the said mayor, aldermen and commonalty of the city of New York as upon the owners, lessees, persons and parties interested (in) and entitled unto the lands, tenements, hereditaments and premises mentioned in the said report, and also upon all other persons whomsoever."

On an appeal from an order confirming the report of commissioners, the Court of Appeals, in *Matter of Commissioners of Central Park* (50 N. Y. 493), held that the provisions of the Code of Procedure governing appeals to that court did not apply. Judge ALLEN said: "The Code is broad enough to give an appeal to this court from the order confirming the report of the commissioners. It was made in a special proceeding, and does affect substantial rights, and is final (Code, § 11, 3\*). If, therefore, this provision

---

\* Code Proc. § 11, subd. 3,—[REp.]

App. Div.]

First Department, February, 1906.

of the Code controls, this court has jurisdiction of the appeal." Referring to section 178 of the act of 1813, cited *supra*, the learned judge proceeded: "Language could not more plainly indicate the intention of the Legislature, that every question connected with the estimate and assessment, everything that could in any form be litigated before and passed upon by the commissioners should be finally and conclusively determined by the Supreme Court without further appeal or right of review or ulterior litigation. \* \* \* This provision is not repealed or affected by the general provisions of the Code\* prescribing the jurisdiction of this court. \* \* \* A special and local statute providing for a particular case or class of cases is not partially repealed or amended as to some of its provisions by a statute general in its terms, provisions and application, unless the intention of the Legislature to repeal or alter the particular law is manifest, although the terms of the general act would, taken strictly, and but for the special law, include the case or cases provided for by it." The appeal was dismissed.

In *Matter of Board of Street Opening, etc.* (111 N. Y. 581), there was an appeal from an order confirming the report of commissioners. The authority to establish the public place in question was given by chapter 451 of the Laws of 1884. The 2d section of that act provided that proceedings to acquire the title to the lands described should be taken "in the manner prescribed (in) and subject to all the provisions of section nine hundred and fifty-five of chapter four hundred and ten of the laws of eighteen hundred and eighty-two," known as the Consolidation Act. Judge GRAY said: "The procedure thereby prescribed has been construed to preclude an appeal to this court from the order of the Supreme Court confirming the report of the commissioners. (*Matter of Department of Public Parks*, 85 N. Y. 459; *Matter of Commissioners of Central Park*, 50 id. 493.) The theory underlying this construction is that these proceedings form an independent and complete system especially created by the Legislature and not connected with or controlled by the provisions of the Code of Civil Procedure† applicable to appeals to this court." And the appeal was dismissed.

\*See Code Proc. § 11 *et seq.*—[REP. † See Code Civ. Proc. § 190 *et seq.*—[REP.

In *Mott v. Eno* (181 N. Y. 365) Judge GRAY said: "Chapter 86 of the Revised Laws of 1813, commonly known as the 'Street Opening Act,' had provided the methods and procedure for the opening of 'any street, avenue, square or public place' laid out by the commissioners under the act of 1807\* whenever the municipal authorities were desirous of doing so. \* \* \* This \* \* \* act and its various amendatory acts have since furnished the legal machinery in all cases of street openings, and it has been held with respect to it that 'language could not more plainly indicate the intention of the Legislature that every question connected with the estimate and assessment, everything that could in any form be litigated before and passed upon by the commissioners, should be finally and conclusively determined by the Supreme Court.'"

Therefore, prior to the enactment of the Greater New York charter, it had been authoritatively determined by the Court of Appeals that the Street Opening Law was a special and local law, complete within itself, and that the provisions of the Code were not to be read into it so as to allow an appeal to the Court of Appeals from a final order confirming the report of commissioners. It had also been settled that an appeal did lie from an order of the Special Term confirming the report of commissioners to the General Term. (*Matter of Kingsbridge Road*, 4 Hun, 599; *affd.* on the opinion of DAVIS, P. J., below, 62 N. Y. 645.) Presiding Justice DAVIS, reviewing the composition of the Supreme Court at the time of the passage of the act of 1813 and subsequent legislation, held that chapter 270 of the Laws of 1854, which provided in section 1 that "an appeal may be taken to the General Term \* \* \* from any judgment, order, or final determination made at a Special Term \* \* \* in any special proceeding therein," did operate to modify the effect of the provision of section 178 of the original act which made the order at Special Term conclusive. He cited *Matter of Canal & Walker Streets* (12 N. Y. 406), where GARDINER, Ch. J., held that, independently of the statute of 1854, the General Term acquired no jurisdiction of the proceedings but that under it an appeal lay to the General Term from the order of confirmation.

Section 990 of the Consolidation Act (as *amd. supra*) has substantially been re-enacted as section 986 of the Greater New York

\* Laws of 1807, chap. 115.—[REP.]

App. Div.]

First Department, February, 1906.

charter and is the same in the revised as in the original charter. New provisions expressly authorizing appeals to the Appellate Division and to the Court of Appeals were for the first time inserted in these street opening statutes. (Greater N. Y. Charter, §§ 988, 989; Revised Greater N. Y. Charter, §§ 988, 989.) By section 988 of the Greater New York charter it was provided that "The City of New York or any party or person affected by the said proceeding and aggrieved by the said report when confirmed as aforesaid, may appeal to the Appellate Division of the said court. Such appeal shall be taken and heard in the manner provided by the Code of Civil Procedure and the rules and practice of the said court in relation to appeals in special proceedings, and such appeal shall be heard and determined by such Appellate Division upon the merits, both as to matters of law and fact. \* \* \* When an order confirming a report shall be reversed upon appeal, the commissioners to whom such report shall be referred for amendment, correction or revisal, shall have power to make such additional assessment as may be necessary." These provisions were continued without change in the revised Greater New York charter.

Here is a provision governing practice, especially providing for an appeal from the order confirming the report of commissioners. Though not in the law at the time of the commencement of the proceedings, it was enacted during their continuance and was in force at the time the report was made, at the time the order appealed from was entered and is in force at the present time. Being a provision respecting practice it is to be applied to the case at bar. The appellant claims that section 1356 of the Code of Civil Procedure applies. That section provides that "an appeal may be taken to the Appellate Division of the Supreme Court from an order affecting a substantial right, made in a special proceeding at a Special Term or a Trial Term of the Supreme Court." But section 1361 of the said Code provides that "the proceedings upon an appeal, taken as prescribed in this title,\* are governed by the provisions of this act, and of the General Rules of Practice relating to an appeal in an action, except as otherwise specially prescribed by law." As the appeal is specially prescribed by law to be from the order confirming the report it does not seem that said section 1356 can be invoked. We are of

---

\* Code Civ. Proc. chap. 12, tit. 5.—[RE.]

opinion that as a most elaborate and elastic scheme has been provided for correcting the errors and mistakes of the commissioners by providing for resubmission to them with instructions by the court at Special Term, there did not exist under the old law any right of appeal from these incidental orders. If so, the very thing sought to be accomplished by the specific powers conferred of correction under direction of the court would have been of little or no avail. As there was no appeal given in terms by the law before the Greater New York charter, the right to appeal to the General Term read into the statute of 1813 by the decision of the court, based upon the act of 1854, was from this final order of confirmation only. As to the present state of the law, it is clear that as the appeal is specifically prescribed to be from the order confirming the report, there can be no appeal from the order denying confirmation and sending the report back for revisal or correction. *Expressio unius est exclusio alterius*. There is no reason for such interlocutory appeal and the very nature of the proceedings makes it unwise to allow it.

The appeal should be dismissed, with ten dollars costs and disbursements to the respondents.

O'BRIEN, P. J., LAUGHLIN and HOUGHTON, JJ., concurred.

Appeal dismissed, with ten dollars costs and disbursements to respondents.

---

WILLIAM A. KISSICK, Plaintiff, v. THOMAS EDWARD REES and ANNA C. REES, Defendants.

Second Department, March 2, 1906.

**Specific performance — when vendor not entitled to reimbursement for taxes paid.**

The vendor, in a contract for the sale of real estate, who fails to deliver a deed of the premises at the time agreed upon, and who pays taxes which became a lien upon the premises subsequent to the time stipulated for the delivery of the deed and before the commencement of an action by the vendee to compel specific performance, which action was adjusted by the allowance to the vendee of the rental value of the premises from the date when the deed should have been given, and to the vendor interest on the purchase price during the same period, cannot recover the moneys so paid for taxes.

App. Div.]

Second Department, March, 1906.

The vendor, by his wrongful act, having compelled the vendee to resort to a court of equity for relief, no consideration of equity would warrant the court in making a new adjustment between the parties by imposing the taxes on the vendee.

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

*E. H. Benn*, for the plaintiff.

*William T. Crook* [*James S. Lawson* with him on the brief], for the defendants.

WOODWARD, J. :

The defendants entered into a contract with the plaintiff for the sale of certain real estate, defendants agreeing to give title on the 1st day of October, 1904. The defendants failed to give the deed as agreed upon in their contract and retained possession of the premises. On the 13th day of October, 1904, while thus in possession of the premises, the defendants paid the taxes, which had become a lien upon the premises, on the third day of the same month, amounting to \$135.72. In November, 1904, the plaintiff brought an action for specific performance of the contract, the litigation resulting in a judgment in his favor. The defendants set up various defenses, in none of which they succeeded, and before the entry of judgment they gave the plaintiff a deed of the premises, this deed bearing date of March 23, 1905. In the adjustment the defendants paid to the plaintiff the rental value of the premises from the first day of October, the date when the deed should have been given, and the plaintiff allowed the defendants interest upon the purchase money during the same period. The defendants now insist that the plaintiff is legally bound to pay the amount of the taxes paid by the defendants in October, 1904, and this is the question to be determined here.

We are unable to understand why the defendants, who were unquestionably in the wrong in this controversy, should be allowed to recover any moneys which they may have been called upon to pay in taxes while in the possession and ownership of the premises. The defendants, having wrongfully retained possession and title to the premises involved in the controversy, are hardly in a position to say that the plaintiff should reimburse them for moneys which they

alone were legally liable to pay. This is not even a case where a third party has assumed to pay the debt of another, in which case there would be no liability, except in a case where such payment had been requested. (*National Bank of Ballston Spa v. Board of Supervisors*, 106 N. Y. 488.) In this case the defendants, as the legal owners of the premises, were bound to pay the taxes which had become a lien, and having wrongfully retained such ownership, compelling the plaintiff to resort to a court of equity for relief, we are of opinion that the judgment decreeing specific performance contemplated what appears to have been done, the payment to the plaintiff of the rental value of the premises, less the interest during the time title was withheld, and no consideration of equity would warrant this court in making a new adjustment and imposing the taxes upon the plaintiff.

The plaintiff should have judgment.

HIRSCHBERG, P. J., JENKS and GAYNOR, JJ., concurred; HOOKER, J., concurred in result.

Judgment for plaintiff, without costs, on submission of controversy.

---

JENNIE W. BABCOCK, Appellant, v. WILLIAM D. LEONARD and SARAH F. SPERRY, as Executors, etc., of JOHN J. SPERRY Deceased, Respondents.

Second Department, March 2, 1906.

**Partnership to speculate in lands — injunction — when carrying out of contract of sale made by one partner will not be enjoined.**

When a contract to speculate in lands constitutes a partnership, and one party thereto holding title in his own name has entered into an executory contract to sell partnership lands at their fair market value, a temporary injunction restraining such sale will be refused in an action by the other partner brought to obtain a permanent injunction prohibiting such sale.

APPEAL by the plaintiff, Jennie W. Babcock, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Queens on the 10th day of October, 1905, vacating an injunction restraining the



App. Div.]

Second Department, March, 1906.

defendants from selling or disposing of certain real estate described in the complaint.

*William R. Adams*, for the appellant.

*Robert E. L. Lewis*, for the respondents.

WOODWARD, J. :

The rights of the respective parties to this action are derived from certain contracts set forth in the pleadings, and we are persuaded that the learned justice presiding at Special Term has correctly construed these instruments and that the plaintiff is not entitled to the injunction which she seeks to have restored during the pendency of the action.

Briefly, one John J. Sperry entered into a contract with Hamlin Babcock, husband of the plaintiff in this action (the latter coming into her interest by an assignment from Hamlin Babcock), for the purpose of engaging in a real estate speculation in Queens county, this State. The contract was reduced to writing on the 17th of March, 1897, and was subsequently modified by two written agreements relating to the same subject, and which concededly are to be read and construed together. In pursuance of the original contract Mr. Sperry purchased a certain tract of real estate of one Daniel G. Thompson, consisting of about twenty-one acres, and paid for the same, partly with \$11,000 of his own money, partly with certain real estate owned by Mr. Babcock and valued at \$3,000, and partly by taking said property subject to a mortgage. The title to this property was taken by Mr. Sperry, who subsequently and during his lifetime sold three acres of the same, leaving about eighteen acres, and this real estate constituted the capital of the copartnership which unquestionably existed between Hamlin Babcock and Mr. Sperry. Mr. Sperry during his lifetime expended considerable sums of money upon this property, and his executors, since his death, which occurred on the 4th of December, 1903, have continued to spend money in carrying the same. On the 4th day of May, 1905, William D. Leonard, as sole acting executor of Mr. Sperry, sold one-half of the remaining eighteen acres of land, and at the same time gave to the purchaser an option on the balance, and afterward, and on the 1st of June, 1905, rendered an account

and statement of said sale, and the proceeds therefrom, to plaintiff's attorney, William R. Adams. It is alleged that this statement came into the hands of the plaintiff, who made no complaint at the price realized, but on the contrary made use of the same as the foundation for a considerable loan. On the fourteenth day of June, the option having been exercised, the said Leonard, as executor, contracted to sell the remaining half of the premises described in the complaint, the title to which was to be closed on the 20th day of September, 1905. Plaintiff brought her action and procured a temporary injunction restraining the defendant from completing the sale on the grounds that under the contract between Sperry and Hamlin Babcock of March 17, 1897, as modified by those of May 28, 1898, and July 29, 1898, the said Sperry had no real interest in the land, but was only an equitable mortgagee for the amount of money Sperry had advanced in the purchase from Thompson of the twenty-one acres, and that the price which the said Leonard was to receive for the remainder was grossly inadequate. Upon an order to show cause the temporary injunction was dissolved and the plaintiff appeals to this court.

It does not seem to be necessary to go into a detailed analysis of these various contracts; it is apparent from the reading of them that Babcock and Sperry were copartners and that Sperry held the title to the real estate as trustee for such copartnership. It is true, as between themselves, Sperry had contracted to limit his liabilities, but it cannot be successfully contended that the elements of a partnership did not exist, and the law is well established that under such circumstances real estate purchased for the partnership is held by one of the partners, where the title is in him, as the trustee of the partnership. This is clearly the case here; and as it appears that the price which the property is to bring is the fair market value of the same, it is not the province of this court to disturb the order appealed from. All of the rights of the plaintiff can be protected in the orderly administration of the law without the interposition of an injunction.

The order appealed from should be affirmed, with costs.

HIRSCHBERG, P. J., RICH and MILLER, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

ALBERTINA RODRIGUES, Respondent, v. THE PRESIDENT AND  
TRUSTEES OF THE VILLAGE OF OSSINING, Appellants.

Second Department, March 2, 1906.

**Negligence — when municipality not liable for fall of pedestrian on  
defective sidewalk — a fall caused by snow.**

The plaintiff, while walking on a flagstone two and a half feet in length, with a slope of two and a half inches, joining two sections of sidewalk having different levels, slipped on such incline, owing to snow thereon, and her foot catching on the flagstone at the foot of the slope, which was raised one-half of an inch above said sloping stone, fell and was injured.

*Held*, that the injury was caused by the slipping of the plaintiff on the snow and not by the slope, or by the lower stone projecting above the same, hence the municipality was not liable.

APPEAL by the defendants, The President and Trustees of the Village of Ossining, from a judgment of the County Court of Westchester county in favor of the plaintiff, entered in the office of the clerk of the county of Westchester on the 1st day of July, 1905, upon the verdict of a jury for \$200, and also from an order entered in said clerk's office on the 31st day of July, 1905, denying the defendants' motion for a new trial made upon the minutes.

*Frank L. Young*, for the appellants.

*Pierre Reynolds*, for the respondent.

HOOVER, J. :

The plaintiff, a woman of seventy-one years of age, has recovered a verdict against the defendants for injuries she sustained because of the alleged negligent maintenance by defendants of a sidewalk in Spring street in the village of Ossining. At the time of the accident there were two grades within one block on that street, the sidewalk along the south side of the block being of a higher grade than that along the north end; these two grades were connected by a sloping flagstone two feet six inches long in the direction of the length of the street, the north end of the stone being two and one-half inches below the south end. The flagstone on the lower grade next adjoining the sloping stone on the north was raised above the

latter so that the south end of that flagstone protruded upwards at the joint with the sloping stone one-half of an inch.

At about eight o'clock in the evening the plaintiff, walking north-erly, approached this sloping stone; she wore rubber shoes and carried an umbrella. The sidewalk was covered with snow from a sixteenth to an eighth of an inch in thickness that had fallen during the day. The place was not well lighted.

That branch of the case which dealt with the plaintiff's contribu-tory negligence was correctly submitted to the jury, and with their verdict we may not interfere so far as that question is concerned. The constructive notice to the defendants was amply shown. But we feel that the verdict is not to be sustained upon the question of the defendants' negligence.

At the close of the plaintiff's case the defendants moved for a nonsuit on the ground that the evidence failed to establish any neg-ligence on their part, and an exception was taken to its denial. The motion was renewed at the close of all the evidence; it was denied and defendants excepted.

There seemed to be no controversy at the trial that the mere fact that the snow existed on the sidewalk, by which it was made slip-pery, did not render the defendants liable. Although there was evidence in the case tending to show that others had slipped and fallen on this same stone before the trial and when the ground was free from snow, we are of the opinion that the evidence negatives the conclusion that the snow was not the cause of the unfortunate accident.

The plaintiff's description of the exact way in which she was hurt is meagre and does not seem to be sufficient to furnish a clear idea in that regard. She says that she came to this stone and slipped. She says: "I slipped with the foot and my foot came against some-thing, and I fell and kicked it and it threw me back." It is quite evident that as her foot was planted upon the sloping stone she slipped downward until it came into contact with the stone next adjoining on the north, which rose above the lower end of the slant-ing stone half an inch at the joint, and it must be that this riser is what caught her foot and threw her. Had the plaintiff not slipped on the slanting stone, it is unreasonable to suppose she would have met any injury. The difference in grade of half an inch between

App. Div.]

Second Department, March, 1906.

the northerly end of the sloping stone and the southerly end of the stone immediately adjoining it was so slight that we believe no careful or prudent man would reasonably anticipate danger from its existence. The unevenness of the walk at the precise place where the plaintiff's slipping foot was caught was insignificant, and the facts, so far as they bear upon this point, are much more strongly in favor of the defendants than the facts which were considered in the case of *Beltz v. City of Yonkers* (148 N. Y. 67). There the depression existed in the middle of a flag sidewalk, of a depth of the thickness of the surrounding flag, caused by the removal of a small piece of broken stone. The depth of the hole was about two and one-half inches, and the surface area was about two feet two inches in length by seven and one-half inches in width. The alleged fault of the sidewalk in the present case is that one flagging projected half an inch above another across the width of so much of the sidewalk as was paved, and upon this branch of the case the decision in *Beltz v. City of Yonkers* (*supra*) must control in defendants' favor.

Both parties argued to considerable extent in their briefs in respect to the sloping character of the stone, and respondent seems to hold that the defendants were negligent in allowing this sloping stone to exist as it did. As we read the evidence, this question is not important for this reason: Had the plaintiff not slipped it is not to be supposed that she would have caught her foot against the riser and fallen, and her own evidence leads to the belief that it was the snow and not the sloping stone that caused her in the first place to slip. She says: "I suppose it was the snow that caused me to slip on that stone." The case was tried on the theory, however, that if the snow caused the injury the defendants were not liable, and that is doubtless the law. (*Buck v. Village of Glens Falls*, 4 App. Div. 323; *McCarty v. City of Lockport*, 13 id. 494.) This plaintiff would not have fallen if she had not first slipped, and she herself says that the slipping was due to the snow.

JENKS, GAYNOR, RICH and MILLER, JJ., concurred.

Judgment and order of the County Court of Westchester county reversed and new trial ordered, costs to abide the event.

SACKETT & WILHELMS LITHOGRAPHING & PRINTING COMPANY,  
Respondent, v. FREDERICK T. CUMMINS, Defendant, Impleaded  
with GEORGE C. TILYU, Appellant.

Second Department, March 2, 1906.

**Sale — contract to deliver goods F. O. B.— failure to show delivery.**

When a contract for the sale and delivery of advertising posters provides that they are to be delivered by the vendor F. O. B. at the city where the vendee resides and the only evidence of delivery shows that some of them were delivered to a bill-posting company in that city, which company posted a few of them, but no delivery to the defendant is shown, it is error for the court to direct a verdict for the vendor. The question of delivery is for the jury.

A letter of the vendee to the vendor repudiating the order for the posters given by his agent, which letter was written on first learning of the order, is not as a matter of law an admission of delivery, but at the most raises a question for the jury.

GAYNOR, J. (concurring in result only): Delivery to the bill-posting company would have been delivery to the defendant; but no such delivery was shown, for the fact that the bill-posting company posted a few of the posters does not show that it received the whole order.

APPEAL by the defendant, George C. Tilyou, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 30th day of March, 1905, upon the verdict of a jury rendered by direction of the court after a trial at the Kings County Trial Term, and also from an order entered in said clerk's office on the 6th day of April, 1905, denying the said defendant's motion for a new trial made upon the minutes.

*Henry E. Heistad*, for the appellant.

*Yorke Allen*, for the respondent.

HOOVER, J. :

This action was brought to recover from the defendants the agreed price for printing certain lithographic posters ordered by the defendant Cummins, to advertise the Cummins Indian Congress, which was at the time exhibiting at a resort of the defendant Tilyou at Coney Island. The defendant Cummins does not appeal, nor was he sworn as a witness upon the trial.

The appellant contends that the proof of delivery of the posters

was not conclusive; that the evidence on that subject was fairly open to the inference that no delivery had been made, and, therefore, that it was error to direct a verdict for the plaintiff.

The order for these posters specified that they should be delivered F. O. B., New York. This order was accepted verbally by the plaintiff, and except as to irrelevant alterations, was the contract for supplying these goods. Plaintiff's evidence establishes directly that there was no delivery to either of the defendants personally, but instead the delivery was to the American Bill-Posting Company of Brooklyn. While it is true that this bill-posting company caused the lithographs to be posted on billboards and rented fences under its charge and upon which it was customary for it to affix advertising matter of this description, there is no direct evidence to suggest that either of the defendants authorized the American Bill-Posting Company to receive these lithographs or to post them, and for aught that positively appears their receipt by the bill-posting company and their later posting may have been a voluntary act on the part of this company. While it may be quite probable that Cummins had made some arrangement with the bill-posting company about receiving and posting the lithographs, thereby creating it a receiving agent so that a delivery to this company should be a delivery under the contract, no evidence of the fact is in the record.

The defendant Tilyou never knew of the contract or of the making of the lithographs until some time after they had been delivered to the bill-posting company and distributed to various places. When he was advised by Cummins that this work had been ordered and supplied he wrote to the plaintiff at once as follows: "Mr. F. T. Cummins has sent in a bill to me which you have rendered to him for printing lithographs for the Indian Congress. Now, I presume you will look to me to pay those bills, but as my contract with him says 'he shall not obligate me in any way in connection with said Indian Congress, unless I have first approved of his acts in that direction.' The first I have learned of said debt having been incurred was on Tuesday when Mr. Cummins sent in your bills for payment. I write you this letter to let you know the exact understanding of matters." He also wrote to Cummins disavowing the latter's act, and stating that he would not recognize the claim for the printing of these lithographs. The plaintiff takes

the view that by this correspondence Tilyou treated the matter as if these posters had been furnished, but we believe that Tilyou's letters are not open to this construction alone. They were dated and sent concededly within two or three days after he first learned of the performance of this work. The learned trial court held that because these letters of Tilyou did not disclaim delivery they are open to the inference that he waived any claim of non-delivery in the matter then in difference between himself and the plaintiff. Such inference is at most a question of fact, and its effect is to be determined by the jury, and should not have been disposed of as a proposition of law by the court. By its direction of a verdict the court held that there was not only no evidence of non-delivery, but that as a matter of law the only inference capable of being drawn from all the evidence was that the posters had been delivered. For this error the judgment should be reversed and a new trial granted.

JENKS, RICH and MILLER, JJ., concurred; GAYNOR, J., concurred in separate memorandum.

GAYNOR, J. (concurring):

I concur in the reversal, but do not agree that it was proved that the posters were received by the bill-posting company and posted on the billboards. If that were so, then their delivery was shown and the judgment would have to be affirmed, for such things go from the printing office to the billboards—that is their delivery. The appellant employed his codefendant Cummins as his “general manager” at a monthly salary to exhibit the latter’s Indian show at the appellant’s park at Coney Island. The agreement is written, and provides that the appellant shall pay the expenses necessary to “install” the show and for its “maintenance.” The quotation from the agreement in the appellant’s letter is false; there is no such thing in it. The trial judge therefore correctly ruled that the appellant was bound by the act of the defendant Cummins in ordering the posters; that it was within his agency. But it was not proved that the posters were ever delivered. The failure on that head is pitiful, especially in the case of a plaintiff seeking judgment for an honest bill. Counsel for the plaintiff first considered that evidence that two of the posters were seen posted in the appellant’s park proved delivery of all of them—11,008 in all—and



App. Div.]

Second Department, March, 1906.

rested. Next he produced the evidence of the bookkeeper of the bill-posting firm that he saw some of them on billboards; and finally he deemed an admission of counsel for defendant Cummins in open court that the posters were delivered to him as binding on the appellant. The feelings of the learned trial judge may be imagined. In his anxiety to do justice in spite of the obstacles put in his way, he could not bring himself to direct a verdict for the defendants, and finally directed a verdict for the plaintiff, holding a delivery was shown.

Judgment and order reversed and new trial granted, costs to abide the event.

---

JOHN A. WOOD and WILBUR B. WOOD, Composing the Firm of  
JOHN A. WOOD & SON, Respondents, v. MARY ANN RAIRDEN,  
Appellant.

Second Department, March 2, 1906.

**Bills and notes — evidence insufficient to show an indorsement to be without recourse — direction of verdict — effect of failure to claim but one question as proper for jury.**

When a client in settling a dispute with her attorney as to the compensation due him has turned over to him indorsed in blank a promissory note of which she was the payee, and has also given her own note for the balance, she is liable on her indorsement when such note goes to protest. A claim that it was agreed that her indorsement was to be without recourse is not substantiated by testimony by the defendant that the attorney gave a receipt "without any restrictions \* \* \* in consideration of payment, and told me so, and would give me a receipt in full without any restrictions, and I consider the bill was paid."

On such testimony a verdict for the holder should be directed.

A statement by a party that he wishes to go to the jury on a specific question, followed by a mere exception to the direction of a verdict, waives the presentation to the jury of any question save the one stated.

APPEAL by the defendant, Mary Ann Rairden, from a judgment of the County Court of Queens county in favor of the plaintiffs, entered in the office of the clerk of the county of Queens on the 26th day of April, 1905, upon the verdict of a jury rendered by direction of the court.

*Justin S. Galland*, for the appellant.

*William Willett, Jr.*, for the respondents.

HOOKEE, J. :

This action is by the holder against an indorser of a promissory note. The court directed a verdict in favor of the plaintiffs at the close of the evidence, and the defendant appeals. Upon the trial the defendant sought to establish that the contract of indorsement was made without consideration, and in this she failed. Her pleading, by omitting to deny, admitted the indorsement and delivery to the plaintiffs for value. The circumstances of the delivery were practically these: That the plaintiffs' attorney presented to her a bill which he claimed she owed them. She stated that the amount of the bill was in dispute and she did not think she should be required to pay it or any of it until the matters in difference between them should be settled, and she even went so far as to claim that nothing was owing. It was suggested, however, at the interview that the matter might be adjusted by the indorsement and delivery to the plaintiffs of the note in suit, which had been held by her for some time as payee, and the delivery to the plaintiffs of her own note for the difference between the face of the old note and the amount in question. This she did. The note which bore her indorsement was protested and this action was commenced.

The final paragraph of her answer alleged that the contract of indorsement was upon the agreement that the defendant was not in any event to be liable for the payment of the note, which would amount to an agreement that the indorsement should be without recourse. As written, it appeared, however, to be indorsed in blank. The plaintiffs' attorney urged that her evidence was sufficient to warrant a finding that such was the contract, but it fell far short of this. The only evidence she gave which might tend to such a conclusion was: "I gave him that note, and I gave him mine, and he gave me a receipt in full without any restrictions. \* \* \* He took it in consideration of payment, and told me so, and would give me a receipt in full without any restrictions, and I consider the bill was paid." This evidence tends rather to establish the fact that the notes were taken in absolute payment of the bill than that the note was indorsed without recourse.

At the close of all the evidence the court said, addressing the defendant's counsel, "What issue can I present to the jury, Mr. Galland?" This interrogatory was put in the absence of any motion by either party to direct a verdict, and it was evidently in the court's mind that a verdict should be directed for the plaintiffs upon the evidence then presented. Mr. Galland then replied: "The single question whether or not this \$250 note was delivered upon agreement as to payment in full to that extent — The question for the jury is whether those are the circumstances under which that note was delivered, whether delivered as an absolute payment or a conditional payment." The court then outlined its views on that question, and directed a verdict in favor of the plaintiffs. The defendant's attorney then excepted to the direction of the verdict, but made no requests to go to the jury on any special or any general questions of fact. It is doubtless true that where the court directs a verdict, an exception to the ruling, in the absence of anything from which it might be implied that the right to go to the jury had been waived, is sufficient to present the question on appeal that there were questions of fact for the jury, and it was unnecessary to request that every fact should be submitted. (*Vail v. Reynolds*, 118 N. Y. 297.) It is considered in the cases that the mere opposition to a motion to direct a verdict is such an objection to a direction that it cannot be considered that the party so objecting has waived his right to go to the jury, and in our opinion that rule would govern in this case were it not for the statement made by defendant's counsel, when requested by the court to state what issues there were in the case for the jury, that there was a *single* question in the case, which he then outlined. The defendant, in her answer to the court's inquiry, defined what her theory of the case was, and that definition showed that there was but *one* theory of the case upon which she claimed to be entitled to a judgment. The language of her attorney was sufficient to distract the court's attention from any other question save what he had outlined, and was enough to waive the right of presentation of any question of fact to the jury other than the one he named.

This leads to a consideration of the question whether or not the proposition as stated by the defendant's attorney presents the ques-

tion which should have been submitted to the jury. We think not. The only inference that may be drawn from the defendant's evidence was that the note in suit, together with her own note, was given and received in absolute payment of the plaintiffs' pretended claim. She had disputed at least part of it, and by giving these two notes was settling matters in difference between herself and the plaintiffs, and this certainly constituted no defense to an action based upon her indorsement.

This was the view of the learned court below. It is correct, and the judgment must be affirmed, with costs.

HIRSCHBERG, P. J., JENKS, RICH and MILLER, JJ., concurred.

Judgment of the County Court of Queens county affirmed, with costs.

---

JACOB WINTER and LOUIS KERSHEFSKY, Appellants, v. HYMAN FRIEDMAN, Respondent.

Second Department, March 2, 1906.

**Evidence — when oral contract for sale of lands not merged in written receipt for deposit — when parol evidence of oral contract admissible.**

In an action by the vendee of lands to recover a deposit paid under a parol agreement of sale, the fact that the vendor has executed a written receipt for the payment setting forth part of the contract but not all of it, and contemplating a written contract in the future, does not make parol evidence inadmissible to show the original oral contract, for the same is not merged in such incomplete writing.

APPEAL by the plaintiffs, Jacob Winter and another, from a judgment of the Municipal Court of the city of New York, borough of Brooklyn, in favor of the defendant, entered in the office of the clerk of said court on the 3d day of February, 1905, dismissing the complaint upon the merits.

*Benjamin Frindel*, for the appellants.

*Harry Zirn*, for the respondent.

RICH, J.:

On the 4th day of August, 1904, the parties in this action entered into an oral agreement, the effect of which was that the plaintiffs

App. Div.]

Second Department, March, 1906.

agreed to purchase from the defendant certain premises in the borough of Brooklyn. Plaintiffs deposited with the defendant the sum of fifty dollars on account of said agreement, whereupon the defendant executed and delivered to them a writing as follows:

“BROOKLYN, N. Y., *Aug. 4 / 04.*

“Received from Messrs. Winter and Kershefskey Fifty Dollars deposit on premises No. 134 Boerum St. Bklyn, N. Y. Price of property Six Thousand Dollars (6000). Subject to a first mortgage of (\$2600) which is to run for 4 years a second mortgage of (\$1625) payable One Hundred Twenty-five Dollars every six months with interest at the rate of 6%. A 3rd mortgage shall be taken by the owner which shall be Seven Hundred Seventy-five Dollars to run for four years payable Fifty Dollars every six months with interest at 6% Contract to be drawn Monday evening August 8, 1904, at the office of Mr. Zirn No. 14 Graham Ave. City. Two Hundred and Fifty Dollars to be paid at the drawing of contract. Seven Hundred Dollars shall be paid at the closing of title.

“H. FRIEDMAN.”

The parties met at the time and place named in the instrument and a disagreement arose as to what the contract to be executed should contain. The plaintiffs insisted that the defendant had agreed to convey the property to them free from tenement-house violations and asked that a provision to that effect be inserted in the contract. The defendant refused to assent to this and the negotiations ended. The plaintiffs thereupon brought this action to recover the sum deposited. The court upon the trial refused to receive any evidence of the oral agreement or of the conversation between the parties prior to the execution of the above writing, which was held to constitute the contract between the parties in which the oral agreement was merged.

It is evident that the paper was executed and delivered as a receipt; it is so designated in the pleadings. I do not think it was intended as a contract. It clearly appears from the evidence that it does not contain all of the agreement then entered into, and it provides in terms for drawing a formal contract. It has long been held that when a written instrument is executed as evidence of a part performance of an oral contract, and as incident thereto,

there is no merger; and the rule prohibiting parol evidence, the effect of which is to vary or change a written agreement, does not apply where the original contract was verbal, and the writing was only executed as a part performance of an entire oral agreement. (*Juilliard v. Chaffee*, 92 N. Y. 529, 535; *Eighmie v. Taylor*, 98 id. 288.) I think evidence of the parol agreement was competent, and its exclusion by the trial justice was such an error as to call for a reversal of this judgment.

The judgment should be reversed and a new trial granted, costs to abide the event.

HIRSCHBERG, P. J., WOODWARD, JENKS and MILLER, JJ., concurred.

Judgment of the Municipal Court reversed and new trial ordered, costs to abide the event.

---

PETER W. SCHMITZ, Respondent, v. THE BROOKLYN UNION ELEVATED RAILROAD COMPANY and THE BROOKLYN HEIGHTS RAILROAD COMPANY, Appellants.

Second Department, March 2, 1906.

**Real property — action for damages for injury to value thereof by elevated railway — measure of damages.**

Although a plaintiff cannot recover damages in an action for injury to the rental value of lands caused by the erection of an elevated railway when it is shown that the erection of the railway increased the value of the property, yet a recovery is proper when it is shown that the increased value of the premises resulted from other causes, as the building of a bridge, a subway, improvement of the locality, etc.

Under such circumstances an award of damages is not inconsistent with the finding that the property has been benefited by the elevated railway, if in other respects the value of the premises has been decreased. The damage is the excess of the injury caused over the benefits received.

However, as the value of the easements of such owner in light and air, if any, is nominal, it is reversible error for the court to make an award taking the same as of substantial value, and such an erroneous valuation is shown by a refusal to find that such easements, if any, and the damage thereto are of nominal value.

App. Div.]

Second Department, March, 1906.

APPEAL by the defendants, The Brooklyn Union Elevated Railroad Company and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 9th day of February, 1905, upon the decision of the court rendered after a trial at the Kings County Special Term.

*Charles L. Woody* [*John L. Wells* and *George D. Yeomans* with him on the brief], for the appellants.

*Alexander S. Lyman*, for the respondent.

RICH, J. :

The defendants appeal from a judgment in favor of the plaintiff for \$3,339.40 damages to the rental value of the premises described in the complaint, together with \$346.65 costs, and enjoining and restraining defendants from maintaining or operating their elevated roads in front of plaintiff's premises, after the expiration of thirty days from service of a copy of the judgment with notice of entry thereof, unless within that time the defendants should pay or tender the plaintiff or his attorneys the sum of \$7,500 with interest thereon from January 23, 1905.

The action is the usual one for an injunction, and damages alleged to have been sustained by an abutting owner upon a public street, by the maintenance and operation of an elevated railroad in front of his property. The premises are situate at the north-westerly corner of Flatbush avenue and Fulton street, with a frontage on the two streets of about 216 feet, all of which is affected by the railroad structures; it was purchased by the plaintiff in 1886 for \$150,000, which the evidence of all the experts called shows was its then value; its lowest present value, as proven upon the trial, was \$225,000, and its highest value \$275,000. It is occupied by one tenant, entirely for business purposes, under a ten years' lease from January 1, 1900, at a yearly rental of \$12,000 for the first five years and \$15,000 yearly thereafter, the increased rental being payable at the time of the trial. After plaintiff purchased the property and before the building of the railroad, the evidence shows it to have produced a gross rental of from \$10,000 to \$13,000 yearly, largely dependent upon the extent to which a public music hall, to which use a portion of the premises was then devoted, was

used. From this gross rental there was payable yearly for the compensation of a manager, janitor, heat and light \$1,980 and the cost of insurance, then largely in excess of present rates on account of the scenery and drop curtains used in the music hall.

The trial court found, upon defendants' request, among other things:

"*Twelfth.* That the existence and operation of defendants' railroads in Fulton street and Flatbush avenue, together with the maintenance of two stations of said elevated railroad structure in the immediate locality thereof, has greatly increased the traffic of business in the locality of plaintiff's property and has brought people and traffic into said streets.

"*Thirteenth.* That the plaintiff's property has thereby incidentally been benefited."

"*Eighteenth.* That in the immediate vicinity of plaintiff's premises defendants maintain two stations where people depart from and take said elevated railroad, and thereby daily brings\* into the immediate vicinity a large number of people which is beneficial to both the rental and fee value of plaintiff's premises."

"*Twentieth.* That on all cross streets and side streets in the locality of plaintiff's premises where there is no elevated railroad, real estate has not increased either in fee or rental values as fast, nor in the same proportion or to the same amount since 1888 down to the present time as the plaintiff's premises has.\*

"*Twenty-first.* That the course of fee and rental values on Fulton street and Flatbush avenue in the vicinity of plaintiff's premises, since 1888 to the present time has increased faster and to a greater extent than the course of fee and rental values have on the cross and side streets where there are no elevated railroads in that locality."

"*Twenty-seventh.* That the presence of defendants' elevated railroad and of their stations at or near the intersections of Fulton street and Flatbush avenue, brings a large number of persons daily into Flatbush avenue and Fulton street in the immediate neighborhood of plaintiff's premises and increases the traffic in and upon said streets at said points in the neighborhood of said properties, respectively."

---

\**Sic.*



Counsel for the appellants bases his contention largely upon the proposition that the quoted findings of the trial justice establish that the plaintiff has not sustained damage and that his complaint should have been dismissed. He directs our attention to several authorities from which he deduces the general rule that where the evidence establishes that the plaintiff's property has increased in fee and rental values since the construction of the road, a judgment for damages cannot be sustained. This proposition is undoubtedly sound in cases where the increase is traceable directly to the presence of the road and the evidence does not disclose any other adequate cause for the increased value, but in the case at bar the evidence is amply sufficient to sustain a finding that the increase in value of plaintiff's property, both fee and rental, was attributable to causes entirely outside of and disconnected from the construction and operation of defendants' roads. Immediately after their construction and operation, and for several years thereafter, there was not only no advance but a decline in values, both fee and rental. After the completion of the road, on different occasions and as late as 1899, the plaintiff made extensive alterations and improvements in the buildings upon his property at an expense of upwards of \$40,000. The defendants' witness Rustin testified that in 1901 the premises were worth \$170,000, an amount only \$20,000 in excess of their value when plaintiff purchased in 1886, and this notwithstanding the expenditure of upwards of \$40,000 in alterations and improvements, necessarily increasing value. In 1902, according to this witness, the value increased \$30,000, and since then has continued to advance, but he testifies: "The jump of \$30,000 in one year was caused by sales in the neighborhood and the demand for that kind of property. The location created the sales in that neighborhood and the demand for that kind of property all along Fulton street from Smith street up to Flatbush avenue and Flatbush up to Lafayette. I know the location of bridge number 3 has been determined in the last three or four years, that was one of the elements in causing the increase in value, and the subway under actual construction now in Fulton street and Flatbush avenue, that is an important element. And the Long Island Railroad is making extensive improvements for depot purposes just above Flatbush at Atlantic avenue. That is another improvement, and the contem-

plated extension of Flatbush avenue to the bridge number 3. That is practically settled. \* \* \* I account for the jump from \$240,000 to \$300,000 from last year to this year to the new bridge, to the tunnel, to the extension of Flatbush avenue and the Long Island improvement and the number of sales of Fulton street and Flatbush avenue property since 1903."

It was proven without contradiction that the effort to locate and mass department stores in Fulton street and Flatbush avenue was started before defendants' roads were projected or constructed and about the time of the opening of the Brooklyn bridge in 1884 or 1885. This evidence (with other testimony to which I do not deem it necessary to specifically refer) would, if believed, furnish a proper and satisfactory foundation upon which to base a finding that the increase in values of plaintiff's property (fee and rental) was due to causes wholly disconnected from and excluding the construction and operation of defendants' roads. The record discloses that the elevated structures surround and close up the entire frontage, on both streets, of plaintiff's property (which is situated in the heart of the department store shopping district of Brooklyn) to an extraordinary extent; on each side of the plaintiff's building is an elevated railroad, and in front are two, one crossing under the other; the property is so located as to be unusually dependent for light and air upon the streets upon which it abuts, inclosing it upon three sides; the appurtenant easements of light, air and access are unusually extensive and have been abridged in such an extraordinary degree as to justify a finding that there was an excess of injury over benefits demanding substantial compensation. These views lead me to the belief that the findings quoted are consistent with the conclusion arrived at by the learned trial justice; that after offsetting benefits received by plaintiff's property from the construction and operation of defendants' roads, there yet remained some damage to its fee and rental value.

The determination of whether the trial court was guided by erroneous rules in arriving at the amount of such damage presents the only remaining question necessary to consider. Counsel for the appellants contends that the exception to the refusal of the trial court to find, as requested: "Twenty-sixth. That the easements, if any, appurtenant to the several lots of land interfered with by the

defendants' railway, besides any consequential damages, if any, to said premises from the taking of the same, have in themselves only a nominal value," presents reversible error, and in this contention I think he is clearly right. I am unable to distinguish this case from *Bookman v. New York Elevated R. R. Co.* (137 N. Y. 302); *Sperb v. Metropolitan Elevated R. Co.* (Id. 596); *Saxton v. New York Elevated R. R. Co.* (139 id. 320), and other cases which he cites, in which the refusal to find, practically as requested in the case at bar, was held error requiring the reversal of the judgments appealed from. The proposition embraced in the request has long been the settled law of this State. The court having first found that the only property rights of the plaintiff taken or interfered with by the defendants were the easements of air, light and access, and then refusing to find that such easements have in themselves only a nominal value, seems to me to establish necessarily and conclusively that the learned trial justice determined that the easements had a substantial value which is included in the judgment under review, constituting reversible error.

The record does not satisfactorily show that in arriving at the amount of damages sustained by plaintiff through the abridgment of his easements of air, light and access to his property by defendants' structures, the court did not include a substantial sum as the value of such easements instead of the nominal value to which the rules of law laid down by the Court of Appeals in the cases cited limited damages of that character. His refusal to find as requested constrains me to believe that he did. Neither of the cases cited by the learned counsel for the respondent (*Sixth Avenue R. R. Co. v. Metropolitan Elevated R. Co.*, 138 N. Y. 548; *Cook v. New York Elevated R. R. Co.*, 144 id. 115) meets this objection. In the first case the findings clearly show that the benefits found were offset against the consequential damages (which excluded substantial easement values), and in the second case the trial court found that there were no actual, substantial or peculiar benefits to the property in suit arising from the construction or maintenance of the defendant's railroad in front of the plaintiff's premises, while in the case at bar it is expressly found that plaintiff's property has been actually and substantially benefited by the construction and maintenance of the defendants' roads.

The 12th and 13th findings of fact in the case at bar are substantially and in effect the same as the findings in the *Bookman* and *Saxton* cases and subject to the same criticism, viz., that they do not limit the damages allowed to the difference between the benefits received and the consequential damages sustained, but appear to include a substantial sum as, and representing the value of, the easements interfered with. The request to find is in the identical language used in these cases, and the principles there determined govern the disposition of the appeal in the case at bar. It appearing that the trial court was guided by an erroneous rule, founded upon a refusal to find, the judgment must be reversed. (*Cook v. New York Elevated R. R. Co.*, 144 N. Y. 115, 119.)

The judgment should be reversed and a new trial granted, costs to abide the event.

HIRSCHBERG, P. J., JENKS, HOOKER and MILLER, JJ., concurred.

Judgment reversed and new trial granted, costs to abide the event.

---

EDWARD WATT, an Infant, by ALICE WATT, His Guardian ad Litem,  
Respondent, v. CHARLES L. FELTMAN and ALFRED FELTMAN,  
Appellants.

Second Department, March 2, 1906.

**Examination before trial — examination of defendants who deny ownership of car which injured plaintiff.**

When, in an action to recover damages for personal injuries, the defendants deny that the car which injured the plaintiff was owned or operated by them, an order for the examination of such defendants before trial should be granted when the plaintiff shows that he has no information on the subject and after diligent inquiry cannot learn where the same can be found.

APPEAL by the defendants, Charles L. Feltman and another, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 19th day of October, 1905, denying the defendants' motion to vacate a previous order for their examination before trial.

*Joseph M. Gazzam, Jr.*, for the appellants.

*Bruce R. Duncan*, for the respondent.

App. Div.]

Second Department, March, 1906.

RICH, J.:

This action was brought to recover damages for personal injuries alleged to have been sustained by plaintiff while riding as a passenger in a coaster car on a scenic railway known as "Ziz." Plaintiff alleged that this car was operated by the defendants upon their premises in Coney Island. Defendants denied this allegation, and after issue was joined an order was made upon plaintiff's application requiring that the defendants be examined and their depositions taken as prescribed by section 872 of the Code of Civil Procedure, whereupon the defendants moved at Special Term to vacate this order, and from the order denying the motion this appeal is taken.

It appeared in *Tenoza v. Pelham Hod Elevating Co.* (50 App. Div. 581), to which our attention is called, that the application there was made for the sole purpose of discovering whether any cause of action existed, with the view of discontinuing the action if it did not, but we cannot say from the record before us that the application was for such a purpose. The defendants having denied that they owned and operated the car, plaintiff's cause of action fails unless it is shown upon the trial that they did. It appears by the affidavit of plaintiff's guardian *ad litem*, read on the application for the order, that neither she nor the plaintiff had any information upon the subject; that, "although diligent inquiry and effort has been made on behalf of the said plaintiff, it has been impossible to obtain any proof in regard thereto or to learn where said proof can be found. All those facts are peculiarly within the personal knowledge of the defendants." Plaintiff would have a right to call the defendants as witnesses upon the trial, and it is equally clear that their evidence can be taken before trial. (*Vial v. Jackson*, 73 App. Div. 355; *Sweeney v. Sturgis*, 24 Hun, 162; *Matter of Nolan*, 70 id. 536; *Clark v. Wilcklow*, 75 id. 290.) We think, therefore, that the order was properly granted, and the order of the Special Term must be affirmed.

HIRSCHBERG, P. J., WOODWARD and JENKS, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

JESSE W. RENO, Appellant, v. FREDERIC THOMPSON and ELMER S. DUNDY, Respondents.

Second Department, March 2, 1906.

**Former judgment for tort unsatisfied does not bar subsequent action against joint tortfeasor — subsequent action barred only when prior judgment satisfied — reply not necessary to defense of former recovery.**

When in an action for trespass, eviction and conversion of property the answer alleges that a former recovery was had for the same torts against a joint tortfeasor, to which answer the plaintiff has not replied, the trial court is not warranted in dismissing the complaint on the introduction in evidence of the judgment roll in the former action. Nothing but satisfaction for the injury by one tortfeasor will relieve a joint tortfeasor from liability in another action, and proof of the former judgment is no proof that it was satisfied. Proof of satisfaction is necessary to dismissal of the complaint.

The failure of the plaintiff to reply to the answer is not an admission of the allegation that said judgment was paid, as such defense is not a counterclaim and requires no reply. It sets out merely new matter in avoidance.

APPEAL by the plaintiff, Jesse W. Reno, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Kings on the 18th day of March, 1905, upon the dismissal of the complaint by direction of the court after a trial at the Kings County Trial Term.

*Maxwell Slade*, for the appellant.

*L. H. Doorly*, for the respondents.

RICH, J.:

It appears that this plaintiff brought an action in the Supreme Court against one Paul Boyton to recover damages for a trespass and conversion of personal property. In his complaint he alleged an agreement with Boyton by which Boyton let to him a portion of Sea Lion Park, Coney Island, for the season of 1902 and for each season thereafter up to 1914, for the purpose of the erection thereon of an amusement device owned by plaintiff and known as the Electric Cyclorama; that plaintiff went into possession of said premises under said agreement and erected thereon said Electric Cyclorama, "consisting of an octagonal building, including a spiral staircase \* \* \* and two panoramic paintings, the one of the

App. Div.]

Second Department, March, 1906.

Naval Battle of Santiago and the other that of Manila, the cost of which building, staircase and paintings was \$3,000." He further alleged: "(Upon information and belief) That on or about the 1st day of October, 1902, the said defendant, his agents and servants forcibly entered the said premises and took possession thereof, and excluded this plaintiff therefrom and have ever since refused to allow this plaintiff to enter the same.

"VI. (Upon information and belief) That by the wrongful entry of the defendant, his agents and servants as hereinbefore set forth, and their wrongful ejection of this plaintiff he has been damaged, as he verily believes, in the sum of \$18,000, being eighty per cent. of the gross receipts of the entrance fees for the seasons of 1903 up to and including 1914 as estimated by the parties to the said agreement at the time when the rental of twenty per cent. thereof was reserved to the defendant as rent, to wit, \$28,000 less this plaintiff's expenses during the same time, to wit, \$10,800.

"SECOND CAUSE OF ACTION.

"Repeating paragraphs I, II and III hereinbefore set forth and making them a part of this cause of action, this plaintiff further alleges that on or about the 1st day of October, 1902, the said defendant took and carried away and converted to his own use the building and paintings hereinbefore set forth, to this plaintiff's damage \$3,000.

"Wherefore this plaintiff prays judgment against said defendant for the sum of \$21,000 with interest from October 1st, 1902."

Boyton denied these allegations of the complaint, and alleged a breach of the contract and its consequent termination before the close of the season of 1902, at which time plaintiff was to remove his building from the park. He further alleged that he was never the owner of Sea Lion Park; that it was owned by the Sea Beach Land Company, who had leased the same to one Lenehan, whose lease expired January 1, 1905; that on August 12, 1902, Lenehan failed to pay the rent, etc., and said company entered and took possession of the premises and, according to the terms of the lease, all of the buildings erected thereon, presumably the one erected by the plaintiff.

The issues so formed came on for trial at a Trial Term held June

8, 1904. The jury rendered a verdict for the plaintiff for \$1,800, on which judgment was entered on June 15, 1904, for \$1,934.05.

This action was commenced July 23, 1903, in which plaintiff seeks to recover damages for the same trespass, eviction and conversion. The reading of the two complaints leaves no room for doubt that the causes of action are identical. The defendants, by their amended answer, denied the allegations of the complaint, and alleged affirmatively the former action against Boyton, that the trespass and conversion alleged in that action is the same trespass and same conversion alleged and sought to be recovered for in this action. The plaintiff served no reply. After a jury had been impaneled counsel for the defendants moved for judgment upon the pleadings upon the ground that "it appears affirmatively that there has been one recovery for the cause of action sued for herein, reduced to judgment and satisfied," and the motion was granted, to which plaintiff's counsel excepted,

In granting this motion we think the learned trial justice committed an error which calls for a reversal of the judgment. There is no question but that the contention of counsel for the defendants that where an action is brought against one of several joint tortfeasors to recover the entire damages sustained, followed by judgment which is paid to plaintiff, that he cannot again recover against other wrongdoers damages for the same tort, the rule being that he can have but one satisfaction, and payment of the judgment recovered by one wrongdoer discharges the others; but this record does not present that question for our determination. The question here is, was there any evidence before the trial court warranting the learned trial justice in taking the case from the jury and dismissing the complaint? There was no evidence that defendants and Boyton were joint tortfeasors; the fact was not alleged, or that the judgment recovered in the former action had been paid. Until such payment was established the plaintiff could maintain the action against either or all of the wrongdoers. Nothing short of satisfaction for the injury would relieve them from liability. There was no such evidence; there was no such admission in the pleadings, and none appears to have been made by counsel. The only evidence before the court was the judgment roll in the former action.

The answer alleged the payment and satisfaction of the judgment,



App. Div.]

Third Department, January, 1906.

and counsel for defendants contends that in consequence of plaintiff's failure to reply to this allegation he admitted its truth, and for the purposes of this action such payment must be held to have been made, and calls our attention to section 522 of the Code of Civil Procedure as an authority for the contention. The answer in this case did not contain a counterclaim; no reply was, therefore, required. The bringing of the former action and payment and discharge of the judgment recovered therein did not constitute a counterclaim, and was not alleged as such. It was new matter, pleaded as a defense by way of avoidance, to which plaintiff was not bound to reply. The defendants might have procured an order under the provisions of section 516 of the Code of Civil Procedure, directing the plaintiff to reply, and had he then omitted to reply the new matter would have stood as admitted.

For the reasons stated the judgment must be reversed and a new trial granted, costs to abide the event.

JENKS, HOOKER and MILLER, JJ., concurred.

Judgment reversed and new trial granted, costs to abide the event.

---

THE PEOPLE OF THE STATE OF NEW YORK ex rel. GEORGE BIDWELL,  
Respondent, v. SEBASTIAN W. PITTS, Sheriff of Albany County,  
New York, and Custodian of the Albany County Penitentiary,  
Appellant.

Third Department, January 19, 1906.

**Criminal law — habeas corpus — certificate of conviction when sufficient.**

A certificate of conviction is not defective in failing to state the time when and the place where and the person from whom a larceny was committed, and such omissions furnish no ground for the release of the offender on habeas corpus.

APPEAL from an order made by the recorder of the city of Albany and entered in the office of the clerk of the county of Albany on the 31st day of January, 1905, discharging the relator from the custody of Sebastian W. Pitts, sheriff of Albany county, on the ground of the alleged insufficiency of the certificate of conviction by which he is held.

*George Addington, District Attorney, and Robert H. McCormic, Assistant District Attorney, for the appellant.*

*William E. Woollard, for the respondent.*

KELLOGG, J.:

The relator seeks his liberty without serving his sentence, on the sole ground that the certificate of conviction by which he is held by the sheriff is improper and defective in not stating the time when, the place where and the person from whom the larceny was committed. By section 485 of the Code of Criminal Procedure the judgment of conviction is required to state "briefly the offense for which the conviction has been had," and it was held the words "assault in the third degree" were a sufficient compliance with that requirement, as it named the offense used by section 219 of the Penal Code. (*Matter of Bartholomew*, 106 App. Div. 371.)

In the case at bar the certificate of conviction was made by the justice of the peace in the form required by section 721 of the Code of Criminal Procedure in such case. Where that section says, "briefly designating the offense," is inserted the words "petit larceny," which is the precise name of the offense as defined by section 532 of the Penal Code, and the *Bartholomew* case holds that a sufficient designation of the crime.

Section 724 of the Code of Criminal Procedure declares that a certificate of conviction in the form required by sections 721 and 722 is conclusive evidence of the facts stated therein. There is no allegation here that the judgment (which the court makes under section 717 of the Code of Criminal Procedure) is void or defective, as was claimed in the *Bartholomew* case.

"A commitment is a warrant, order or process by which a court or magistrate directs a ministerial officer to take a person to prison or to detain him there." (*People ex rel. Allen v. Hagan*, 170 N. Y. 46, 49.)

The form used in the Code of Criminal Procedure is substantially an adoption of the old common-law form as described in the above case.

"Whenever the question has arisen in this court concerning the sufficiency of such a commitment it has been decided substantially in accordance with the principles above stated, although it has been

App. Div.]

Third Department, January, 1906.

held that the statement of the crime in the commitment, according to its statutory definition, was sufficient. (*People v. Johnson*, 110 N. Y. 134.)” (*People ex rel. Allen v. Hagan*, *supra*, 50.)

In *People ex rel. Sullivan v. Sloan* (39 App. Div. 265) the justice followed the form of the statute in making the certificate, and it did not state the time or the place of the larceny or that it was committed in the county. It was held sufficient.

The certificate in question is in the statutory form, and is sufficient. The order appealed from, therefore, is reversed, the writ of habeas corpus quashed and the relator remanded to the custody of the said sheriff as custodian of said penitentiary, to serve the balance of his term.

All concurred.

Order reversed, writ of habeas corpus quashed, and relator remanded to the custody of the sheriff of Albany county, as custodian of the penitentiary, to serve the balance of his term.

---

THE PEOPLE OF THE STATE OF NEW YORK ex rel. RUDOLPH COOK,  
Respondent, v. SEBASTIAN W. PITTS, Sheriff of Albany County,  
New York, and Custodian of the Albany County Penitentiary,  
Appellant.

Third Department, January 19, 1906.

**Criminal law — habeas corpus — when certificate of conviction sufficient.**

A certificate of conviction which uses the words “having thereupon pleaded guilty, it is adjudged,” etc., is a substantial compliance with the statute (Code Crim. Proc. §§ 721, 722), and furnishes no ground for the release of the offender on habeas corpus.

APPEAL from an order made by the recorder of the city of Albany and entered in the office of the clerk of the county of Albany on the 9th day of February, 1905, discharging the relator from the custody of Sebastian W. Pitts, as sheriff of the county of Albany, on the ground of the alleged insufficiency of the certificate of conviction by which he is held.

APP. DIV.—VOL. CXI. 21

*George Addington, District Attorney, and Robert H. McCormick, Assistant District Attorney, for the appellant.*

*Edward J. Brennan and Mark Cohn, for the respondent.*

KELLOGG, J. :

This case is governed by the rule in *People ex rel. Bidwell v. Pitts* (111 App. Div. 319), decided at this term of court. The certificate uses the words "having thereupon pleaded guilty, it is adjudged," etc., while the statutory form (Code Crim. Proc. §§ 721, 722) uses the words "having been thereupon duly convicted upon a plea of guilty, it is adjudged," etc., but it has been held this is a substantial compliance with the statutory form, as upon a plea of guilty the only duty of the court is to sentence. (*People ex rel. Evans v. McEwen*, 67 How. Pr. 105, 112, 113.)

The order appealed from is, therefore, reversed, the writ of habeas corpus quashed and the relator remanded to the custody of said sheriff as custodian of said penitentiary to serve the balance of his term.

All concurred.

Order reversed, writ of habeas corpus quashed, and relator remanded to the custody of the sheriff of Albany county, as custodian of the penitentiary, to serve balance of his term.

---

In the Matter of the Appraisal of the Estate of WAGER J. HULL,  
Deceased, under the Acts Relative to the Taxable Transfers of  
Property.

THE COMPTROLLER OF THE STATE OF NEW YORK, Appellant;  
IDA M. HULL, Respondent.

Second Department, March 2, 1906,

**Tax Law — inheritance tax — when situs of property immaterial — property passing under power of appointment exercised by resident is taxable.**

The liability of property to an inheritance tax does not depend upon the location of such property, but upon whether the beneficiary came into possession through the exercise of a privilege conferred by the State.

App. Div.]

Second Department, March, 1906.

Hence, when the donee of a power of appointment, who is a resident of this State and received such power from a testatrix who was also a resident, exercises that power, the property is subject to an inheritance tax, although situated in another State.

There is no distinction made in this respect between real and personal property.

APPEAL by The Comptroller of the State of New York from a decree, entered in the Surrogate's Court of the county of Westchester, in reference to a transfer tax upon the estate of Wager J. Hull, deceased.

*Frank M. Buck*, for the appellant.

*Albert Ritchie* [*Joseph W. Middlebrook* with him on the brief], for the respondent.

WOODWARD, J. :

Caroline C. Hull departed this life in January, 1874. At the time of her death she was a resident of the county of New York. She left a last will and testament, which was duly admitted to probate in the county of her residence, and was subsequently, and on the 28th day of March, 1874, filed in Camden county, N. J., where she owned certain real estate. By the terms of her will, the said Caroline C. Hull bequeathed to her son, Wager J. Hull, the income of four-thirteenths of her estate for his use during his life, with a power of appointment as to the principal of said fund, the same to be carried into effect by him either in his last will and testament, or any instrument executed by him in the presence of two witnesses or more. At the death of said Caroline C. Hull, the said four-thirteenths of her estate consisted of an undivided interest in real estate belonging to her father, Richard M. Cooper, a resident of the State of New Jersey, but for a long time subsequent to her death the said four-thirteenths of her estate had been converted into cash and had remained in that form, or had been invested in bonds and mortgages on property in New Jersey. The said Wager J. Hull died a resident of the county of Westchester on the 5th day of April, 1902, leaving a last will and testament, which was duly admitted to probate in said county on the 14th day of May, 1902. By the terms of this will the said Wager J. Hull exercised the power of appointment conferred upon him by the will of his

mother, the said Caroline C. Hull, and gave the fund above mentioned to his wife, Ida M. Hull, absolutely and forever, she being also a resident of the county of Westchester. Pursuant to said power of appointment the trustees of the said fund in Camden county, N. J., paid to Ida M. Hull, between the 9th day of September, 1902, and the 5th day of May, 1904, the sum of \$26,537, the proceeds of said interest as above set forth, so that it appears that the said Ida M. Hull has received this sum of money through a power of appointment made in the will of the said Caroline C. Hull, a resident of the State of New York.

On the 2d day of June, 1902, Charles H. Lovett was appointed transfer tax appraiser in this matter, and after taking testimony, filed his report with the surrogate of Westchester county on the 21st day of February, 1905, where he found that the fund above mentioned was taxable against Ida M. Hull, the sole beneficiary, at one per cent. This report was confirmed in a decree in the usual form, and subsequently and on the 17th day of April, 1905, an appeal having been taken by the executrix from the report of said appraiser and the decree entered thereon, to the surrogate of Westchester county, the same was reversed, and the Comptroller of the State of New York appeals from this decree of the surrogate.

We are of opinion that the learned surrogate has fallen into error in reversing the original decree in this matter, due to the confusion of the question by an entirely irrelevant detail in relation to the situs of the property which passed to the said Ida M. Hull. The question is not where the property was located, or whether it was real estate or personal property, but whether the beneficiary came into its possession through the exercise of a privilege conferred by the State of New York. The Tax Law (Laws of 1896, chap. 908, § 220, subd. 5, as amd. by Laws of 1897, chap. 284) provides as follows: "Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will," etc. It is not the property which is the subject of taxation; it is the right or

App. Div.]

Second Department, March, 1906.

privilege which the State confers upon citizens of this State to dispose of property by will. As was said in *Matter of Swift* (137 N. Y. 77, 85), after reviewing the authorities: "The proposition which suggests itself from reasoning, as from authority, is that the basis of the power to tax is the fact of an actual dominion over the subject of taxation at the time the tax is to be imposed." If the subject of the taxation, whether that be property of a tangible nature or a privilege conferred by the State, is within the jurisdiction or dominion of the Legislature, then it is for that body to determine the question of taxation. In the statute now under consideration the State has enacted that as a condition of exercising a power of appointment, it shall be "deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power."

In *Matter of Dows* (167 N. Y. 227, 231) the court, after calling attention to certain cases decided in the United States Supreme Court, say: "But whatever be the technical source of title of a grantee under a power of appointment, it cannot be denied that in reality and substance it is the execution of the power that gives to the grantee the property passing under it. The will of Dows, Sr., gave his son a power of appointment to be exercised only in a particular manner, to wit, by last will and testament. If, as said by the Supreme Court of the United States, the right to take property by devise is not an inherent or natural right, but a privilege accorded by the State which it may tax or charge for, it follows that the right of a testator to make a will or testamentary instrument is equally a privilege and equally subject to the taxing power of the State. When David Dows, Sr., devised this property to the appointees under the will of his son, he necessarily subjected it to the charge that the State might impose on the privilege accorded to the son of making a will. That charge is the same in character as if it had been laid on the inheritance of the estate of the son himself; that is, for the privilege of succeeding to property under a will." (See *Matter of Lansing*, 182 N. Y. 238, 244, and authorities there cited.) It being the privilege upon the right to succession to property by means of a will that is taxed, and the subject of the litigation being within the jurisdiction of the State, it seems clear that

the beneficiary under the power of appointment contained in the will of Caroline C. Hull, a resident of this State, upon the exercise of that power by Wager J. Hull, likewise a resident of this State, is bound to pay the tax imposed upon that privilege, regardless of the question of where the property to which the power related was located. Ida M. Hull gets all of her rights in and to the property by reason of the exercise of the power, a privilege granted by the State of New York, and she may not be relieved from that obligation because of the fact that the property itself was without the jurisdiction of the State at the time the power was exercised. That is an entirely irrelevant matter.

The decree appealed from should be reversed, and the original decree should be reinstated and confirmed, with costs and disbursements of this appeal.

HIRSCHBERG, P. J., GAYNOR and RICH, JJ., concurred.

Decree of the Surrogate's Court of Westchester county reversed and the original decree reinstated and confirmed, with costs and disbursements of this appeal.

---

GEORGE JOSEPH NIEMANN, an Infant, by ROSINA NIEMANN, His Guardian ad Litem, Respondent, v. GEORGE CORDTMEYER and Others, Appellants, Impleaded with Others.

Second Department, March 2, 1906.

**Will—charge—when error to charge that jury may find testamentary incapacity.**

In an action to set aside a will on the ground of testamentary incapacity and undue influence, it is error to charge that "There is in this case enough to warrant you in finding that this will was the product of undue influence, or in finding that he was incompetent to make a will. It is competent for you to find that, and it is for you to find one way or the other. The court cannot aid you much in reaching a conclusion, but there is no legal obstacle in the way of your finding that this will is void because the man was incompetent to make the will, or because it was the product of undue influence."

Such charge is tantamount to a direction to find testamentary incapacity or undue influence, and usurps the functions of the jury.



App. Div.]

Second Department, March, 1906.

APPEAL by the defendants, George Cordtmeyer and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Richmond on the 9th day of January, 1905, upon the verdict of a jury, and also from an order entered in said clerk's office on the 12th day of October, 1904, denying the said defendants' motion for a new trial made upon the minutes.

*Laurence Arnold Tanzer*, for the appellants Baum and Korn.

*Frank Herwig*, for the respondent.

WOODWARD, J. :

George Niemann died on the 16th day of June, 1900, leaving a last will and testament, which was duly admitted to probate, and this action is brought by his infant son, through his guardian *ad litem*, to have said last will and testament set aside upon the grounds of testamentary incompetency and undue influence.

In the charge the court presents with much of force the argument which the plaintiff might very properly address to the jury, and says : "There is in this case enough to warrant you in finding that this will was the product of undue influence, or in finding that he was incompetent to make a will. It is competent for you to find that, and it is for you to find one way or the other. The court cannot aid you much in reaching a conclusion, but there is no legal obstacle in the way of your finding that this will is void because the man was incompetent to make the will, or because it was the product of undue influence." The only modification of this charge is found in the explanation of the court in response to an exception suggested by defendants' counsel, where the court says : "I did not mean to tell them that they should find it void. I meant merely to tell them that there was no legal obstacle in the way of their so finding if they saw fit."

There is no such strong intimation that the jury has the right to find against the plaintiff, although there was a decided conflict in the evidence as to the facts which were relied upon by the plaintiff as constituting his cause of action, and, as the defendants' counsel suggests, there are few juries with this charge before them who would think it proper to find any other verdict than one for the plaintiff. The portion of the charge which is quoted above is, in

effect, a statement to the jury that there is, as a matter of law, sufficient evidence to sustain the plaintiff's case, which is an usurpation of the province of the jury to determine the weight and sufficiency of the evidence. It is true, of course, that the court must always determine whether there is a question to be determined by the jury; it must determine whether there is any evidence in support of the plaintiff's contention, and the fact that the case is submitted to the jury, after the proper motions have been made to raise the question, is a declaration on the part of the court that there is a question of fact to be determined, but to pass upon this point without comment is quite a different thing from charging the jury affirmatively that there is evidence sufficient to warrant them in finding in favor of the plaintiff, which is a very near approach to an instruction to find in that way. This kind of instruction has been very universally and very properly condemned, for the reason that it is the province of the jury to weigh and measure all questions of fact without that aid from the court which is suggested in the charge now under consideration.

In *Read v. Hurd* (7 Wend. 408) the court charged the jury in effect, "that the said several matters so produced and given in evidence were sufficient to prove an acknowledgment by the said Morris Read of his liability to pay said note." On appeal the court say: "But it was a proper question, under all the circumstances of the case, for the jury (17 Johns. R. 187\*), and it should have been fairly left to them. Admitting that the question was not absolutely taken from the jury by the court, still, their opinion, considered as an opinion upon the weight of evidence, was much stronger than it ought to have been, and was calculated to make an erroneous impression upon the minds of the jurors. The charge, therefore, was erroneous, and the judgment must be reversed on that ground."

The same doctrine was held in *McMorris v. Simpson* (21 Wend. 610) upon the authority already cited, and *Fitzgerald v. Alexander* (19 id. 402), and in the latter case the judgment was reversed because the court had, in response to a motion for a nonsuit, declared "the evidence sufficient" to entitle the plaintiff to recover, "and with that direction, left the cause to the jury."

In *McKenna v. People* (81 N. Y. 360) the court condemns a

---

\* *Roseboom v. Billington* (17 Johns. 187).—[REp.]

App. Div.]

Second Department, March, 1906.

charge that "enough has been proven, if you believe the witnesses on the part of the People," citing the authorities already referred to and others. In commenting upon this charge the court say: "Their attention is thus directed to evidence of inculcation merely; its weight is stated to them as sufficient in law to sustain a conviction for the graver offense, so that the question of fact to which their minds are turned relates to the credibility of certain witnesses, and not the weight or measure of their testimony, or the existence of the intent. How far that testimony was modified or neutralized by that produced by the defendant, or what inferences should be drawn from any of it is virtually excluded from their inquiry. If you believe certain witnesses, says the court, the verdict follows. This was overstepping the province of the judge. Upon the record it cannot be said that such a question was not in the case; but if it was, it was one for the jury and should have been fairly left to them. It is true that the question was not absolutely taken from the jury by the court; this was beyond its power (*People v. Howell*, 5 Hun, 620; affirmed, 69 N. Y. 607\*); but the opinion of the judge, considered as an opinion upon the weight of evidence, was stated much stronger than it ought to have been, and was calculated to make an erroneous impression upon the minds of the jurors, and with that impression, carrying with them into the jury room the weight of the opinion, it cannot be said that the prisoner had, at the outset of their deliberations, an even chance that the conclusions of the jury would be unbiased." (See 11 Ency. of Pl. & Pr. 103.)

We are of opinion, therefore, that upon reason and authority the judgment in this case cannot stand; the charge in this respect erred, and as there must be a reversal of the judgment, it does not seem necessary to consider other questions raised, as it is not to be presumed that a new trial will present these questions.

The judgment should be reversed and a new trial granted.

HIRSCHBERG, P. J., JENKS, RICH and MILLER, JJ., concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

\**Howell v. People* (5 Hun, 620; affd., *sub nom. People v. Howell*, 69 N. Y. 607).  
—[*REP.*

MARY PYMM, Appellant, v. THE CITY OF NEW YORK, Respondent.

Second Department, March 2, 1906.

**Negligence — municipal corporations — city of New York liable for injuries received by reason of accumulation of ice in front of premises of board of education.**

Although the board of education of the city of New York is a corporation independent of the municipal corporation, the city is liable, nevertheless, for damages received from a fall on ice negligently allowed to accumulate on the sidewalk in front of a building occupied by said board of education for school purposes, as the charter of said city imposes on it the duty of keeping its sidewalks in proper condition for public travel.

APPEAL by the plaintiff, Mary Pymm, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 10th day of February, 1904, upon the dismissal of the complaint by direction of the court after a trial at the Kings County Trial Term, and also from an order entered in said clerk's office on the 9th day of March, 1904, denying the plaintiff's motion for a new trial made upon the minutes.

*Edmund C. Viemeister*, for the appellant.

*James W. Covert* [*James D. Bell* and *John J. Delany* with him on the brief], for the respondent.

HOOVER, J. :

At the close of the evidence the court dismissed the complaint on the ground that no negligence had been shown against the city of New York on the theory that the board of education is a separate corporation charged with the maintenance of all school buildings and schoolhouses, and that the city of New York is not responsible for the acts of the educational department.

The evidence offered upon the trial tended to show that on the 4th day of February, 1902, the plaintiff, accompanied by her husband, slipped and fell on ice which had accumulated on North Fifth street, near Driggs avenue, in the borough of Brooklyn. The sidewalk was built of flagstone. The place where the accident occur-

App. Div.]

Second Department, March, 1906.

red was in front of property used and occupied by the board of education for school purposes. The place where the plaintiff fell was directly in front of a water closet in the school yard, which had been either in improper repair, of faulty construction, or misused, so that for some weeks or months prior to the accident water had flowed with greater or less frequency and in more or less volume over the sidewalk, forming a plate of ice, somewhat irregular in outline, and about an inch thick at its deepest part. The plaintiff said that she had not seen any ice at all as she was coming along, and that the sidewalk was clear of ice as she remembered it. She slipped and fell, however, on this accumulation of ice, and suffered a simple fracture of both bones about two inches above the ankle joint of the right leg. There is evidence tending to show that this same ice had been accumulating for two weeks back, and probably more. In warmer weather water flowed directly across the sidewalk; in freezing weather it took the form of ice. It was stipulated that this district was patrolled.

There can be no doubt that the board of education of the city of New York is a corporation independent of the municipal corporation itself, the city of New York. (*Gunnison v. Board of Education*, 176 N. Y. 11.) But this fact cannot be considered as a premise even remotely connected with the conclusion that the defendant is liable in this case. The revised charter (Laws of 1901, chap. 466, § 1055 *et seq.* as amd.), gives to the board large powers, and imposes on it many duties and obligations; but the charter will be searched in vain to find any suggestion that the city of New York itself was to be relieved from the duty it owed to pedestrians properly to maintain the public highways and sidewalks. It is alleged in the complaint, and not denied, that at the time of the accident the defendant was a municipal corporation, having control of North Fifth street at or near Driggs avenue, both of which are public highways in the borough of Brooklyn. It was said in *Hutson v. City of New York* (9 N. Y. 162, 168): "It requires no argument to prove that it is the duty of the defendants to see that the public streets of this densely crowded city are kept in repair, for, where a public body is clothed by statute with power to do an act which concerns the public interests, the execution of the power may be insisted on as a duty." (See, also, *Conrad v. Trustees of the Village of Ithaca*,

Second Department, March, 1906.

[Vol. 111.]

16 N. Y. 158; *Weet v. Trustees of the Village of Brockport*, Id. 161; *Congreve v. Smith*, 18 id. 79; *Davenport v. Ruckman*, 37 id. 568.)

The evidence tended to show that the plaintiff was free from contributory negligence; that the city had had constructive notice of the dangerous condition of the sidewalk, and that it was negligent in permitting the condition which had existed to remain uncorrected, and because this negligence was primarily imputable to the defendant, the city of New York, and because that liability has not been limited by statute, the case should have been submitted to the jury.

The judgment and order appealed from should, therefore, be reversed, and a new trial granted.

HIRSCHBERG, P. J., WOODWARD and JENKS, J.J., concurred.

Judgment and order reversed, and new trial granted, costs to abide the event.

---

MARY LOMAS, Appellant, v. NEW YORK CITY RAILWAY COMPANY,  
Respondent.

Second Department, March 2, 1906.

**Negligence — passenger thrown from surface car by sudden jolt and rendered unconscious — when negligence question for jury.**

In an action to recover damages for injuries sustained through the negligent operation of a surface car, whereby the plaintiff was thrown from the car, the negligence of the defendant is for the jury when the plaintiff has testified that, while standing up and signaling for the car to stop, she felt a sudden severe shock or jolt which threw her, and that thereafter she remembered nothing, being rendered unconscious. On such testimony a nonsuit is error.

The fact that the plaintiff could not state what happened after the shock, by reason of being unconscious, does not prevent a recovery.

JENKS, J., dissented.

APPEAL by the plaintiff, Mary Lomas, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Nassau on the 15th day of March, 1905, upon the dismissal of the complaint by direction of the court after a trial at the Nassau Trial Term.

*Herbert R. Limburger*, for the appellant.

*Anthony J. Ernest* [*Bayard H. Ames* and *James L. Quackenbush* with him on the brief], for the respondent.

HOOKE, J :

In this action of negligence, by passenger against common carrier based upon the negligent operation of defendant's street car, the plaintiff was nonsuited. She entered the car at One Hundred and Sixteenth street and Eighth avenue; with her was her little grandson, three years old; the open trolley car was comfortably filled, but not crowded, and the plaintiff was riding at the right hand or outer end of the seat with the child between her and the extreme outer edge thereof. Intending to alight at Sixty-fifth street, she raised the child on his feet on the seat as the car passed Sixty-sixth street, stood up, and, putting her arm around him, looked toward the conductor and signaled him to stop at Sixty-fifth street. She saw him then put up his arm, and she described what then happened thus: "The right hand clutched the boy and the right hand on the side. The next thing that I can remember is that I could feel a big shock, a big jerk. A big shock, it shook me. Q. What shook you, madam? A. Something that the car jerked as though it was lifting up, as though the car was lifted up and shook me, knocked me over and that is all I know about that. \* \* \* I first stood up to signal him when I had just crossed 66th street. I remained standing until I fell off the car. \* \* \* Q. You don't know whether you fell off that car or not? A. No, I don't know. I only felt a big jerk and I went at once. \* \* \* Q. And was there any motion that you felt of the car? A. Just after I saw the conductor put up his hand that was the motion I felt — a big jerk and it knocked me somewhere, I don't know — I remember the speed of the car. \* \* \* Q. Do you remember getting off that car at all? A. No, I don't remember anything after being in it. Q. You don't remember after being in the car? A. In the car. Q. By that you mean, nothing after signaling the conductor? A. Oh, no, sir, after I got thrown — when the big lurch I got, I don't remember anything else."

The respondent relies especially upon the proposition that there

is no evidence to show that the defendant was negligent, or that such assumed negligence was the proximate cause of plaintiff's injuries. We think it a reasonable inference, however, from the evidence of the plaintiff, to which attention has been called, that she fell from the violent jerking of the car, and it can matter little whether in her fall she struck her head against a part of the car or the pavement itself. The theory of the cases is that the negligence consists in so operating trains as to deprive passengers of their equilibrium and to throw them over while standing where they have a right to stand in the vehicle of the common carrier. The injury to plaintiff's head is clearly established to have been traumatic; soon after the accident the plaintiff's son found her on the sidewalk about opposite to the place where the car experienced the sudden and severe jolt, and he found near the south-bound track, between it and the curbstone, traces of blood. It is evident that the plaintiff lost consciousness at once upon her falling, and hence it is of course impossible for her to tell where she fell and whether she received her injuries by coming in contact with some part of the car or some object exterior to it. But the defendant can have nothing by this failure of the plaintiff to give the detail after she was rendered unconscious, for what she tells of the accident up to the time she was rendered so is sufficient, if true, to establish the defendant's negligence, and this should have taken the case to the jury.

In *Grotsch v. Steinway R. Co.* (19 App. Div. 130) the court said: "As to the starting of the car the proof of negligence was, beyond doubt, such as to require the submission of the question to the jury. The testimony is abundant upon that subject. Several witnesses testify that the car was started with great violence, and the inference is fair that that violence could not have been the result of anything else than the improper application of the power to move the car. It was so great that several of the passengers inside the car were thrown on the floor. \* \* \* That this must have been the result of negligence is the reasonable inference."

In *Miles v. King* (18 App. Div. 41), where, as the train was coming into the station and as plaintiff stood in the aisle she experienced a violent jerk of the train, producing a fracture of her leg, the court said: "We are sensible that, in the operation of rail-



App. Div.]

Second Department, March, 1906.

road trains, there must be more or less jarring, jerking and sudden movements of the train, which are a necessary concomitant to their operation at all, and for which no right of action lies even though injury results. What movements of trains are necessary and what are unnecessary may be, at times, difficult of determination and must rest for solution upon the facts of the particular case. In the present instance we are not able to see that the management of this train, under the circumstances, was so far necessary, or such as might reasonably be expected, as to make its solution a question of law for the court. On the contrary, we think that it became a question of fact for the jury and should have been left to them. The objection that no proof exists to show that the injury was inflicted by the servants of the defendants, or upon a road controlled and operated by them, is sufficiently answered by the authority of the *Wylde Case* (*supra*\*)."

In *Sheeron v. Coney Island & Brooklyn R. R. Co.* (78 App. Div. 476) the court said: "There was testimony of passengers and bystanders that the car crossed Schermerhorn street without stopping; that after crossing it slowed up a little, and then suddenly started quickly with a jerk sufficient to throw standing passengers off their footing and against the seats. Sheeron's fall from the car was coincident with the sudden jerk and the accelerated speed of the car. This evidence, within the principle announced in the cases above cited, required the submission of the case to the jury, and the dismissal of the complaint was error." *Gilmore v. Brooklyn Heights R. R. Co.* (6 App. Div. 117); *Dochtermann v. Brooklyn Heights R. R. Co.* (32 id. 13; *affd.*, 164 N. Y. 586); *Hassen v. Nassau Electric R. R. Co.* (34 App. Div. 72), *Brainard v. Nassau Electric R. R. Co.* (44 id. 613); *Harty v. N. Y. & Queens Co. R. Co.* (95 id. 119) hold the same doctrine.

The respondent asserts that *Griffen v. Manice* (166 N. Y. 188) is authority to the contrary, and quotes this language of Judge CULLEN: "If a passenger in a car is injured by striking the seat in front of him, that of itself authorizes no inference of negligence. If it be shown, however, that he was precipitated against the seat by reason of the train coming in collision with another train, or in

\* *Wylde v. Northern R. R. Co. of N. J.* (53 N. Y. 156). — [REP.]

consequence of the car being derailed, the 'presumption of negligence arises. The '*res*,' therefore, includes the attending circumstances, and, so defined, the application of the rule presents principally the question of the sufficiency of circumstantial evidence to establish, or to justify the jury in inferring, the existence of the traversable or principal fact in issue, the defendant's negligence.

\* \* \* But the question in every case is the same whether the circumstances surrounding the occurrence are such as to justify the jury in inferring the fact in issue."

The cases which have been referred to are not at war with this principle, but are in strict harmony with it. If it had appeared from the record merely that this plaintiff had received a violent injury to the head as she sat on her seat, or even stood with her arm around her grandson, no negligence on the part of the defendant could, of course, have been imputable, but the case goes further than that, and shows the cause of plaintiff's being knocked over to have been an unusually severe jolt, jar or jerk of the car, which impressed the plaintiff as though the car were being lifted up, and which came with such suddenness that she was thrown down. The law imposes upon common carriers the duty to exercise the highest degree of care and caution in the operation of their trains that human skill and prudence can suggest, and it is not the ordinary thing when that degree of care is being observed to jolt or jerk a car with that excessive degree of violence which is inferable from the evidence of the plaintiff. The evidence in the record was sufficient to impose the burden upon the defendant of explaining the manner of the accident, to show if it could freedom from negligence on its part.

GAYNOR, RICH and MILLER, JJ., concurred; JENKS, J, dissented.

Judgment reversed and new trial granted, costs to abide the event.

App. Div.]

Second Department, March, 1906.

In the Matter of Judgment Moneys Recovered in Action of COUNT  
W. WEEKS, Plaintiff, v. E. HOLLOWAY COE, as Executor, etc., of  
E. FRANK COE, Deceased, Defendant.

HENRY M. WHITEHEAD, Appellant ; OAKLEY WEEKS, Respondent.

Second Department, March 2, 1906.

**Contempt—order to show cause must be served personally—relief not  
asked in motion papers cannot be granted.**

An order to show cause why one should not be punished for contempt must be served personally, and service upon counsel is not sufficient.

On the return of an order to show cause why an attorney should not be punished for contempt and for such other and further order as may to the court seem just, etc., an order requiring such attorney to deposit money with a trust company is improper, as such relief was not indicated in the motion papers.

HIRSCHBERG, P. J., dissented.

APPEAL by Henry M. Whitehead from an order of the Supreme Court made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 13th day of June, 1905.

*Thaddeus D. Kenneson*, for the appellant.

*John Oscar Ball* [*A. P. Bachman* with him on the brief], for the respondent.

RICH, J. :

This is an appeal by an attorney at law from an order requiring that he deposit in a certain trust company moneys received by him in an action in which he was the attorney of record for the plaintiff, made upon the return of a show cause order requiring him to show cause why he should not be adjudged in contempt of court, and why such other and further order should not be made in these proceedings as might to the court seem just and equitable. At the time when this order was granted the appellant was away on his vacation, and service was not made upon him personally. It is claimed, however, that it was served upon his counsel, pursuant to a direction therein contained, who appeared specially upon the return thereof, and

called attention to the fact that the show cause order had not been served upon the appellant, and that as he had ceased to act as his attorney he had no authority to appear for him in the proceedings.

We think that in entertaining the proceedings and making the order from which this appeal is taken, the learned court at Special Term acted without jurisdiction. It is true that the attorney upon whom the service was made had appeared as counsel for the appellant upon a motion in this action some months prior to the date of the pretended service upon him, but he had ceased to act for him as his counsel. Even if the relation of counsel and client continued to exist, this would not validate the service of the show cause order. It was a new proceeding in which it was not pretended that appellant had engaged counsel to represent him. "A proceeding relative to a contempt is a new proceeding, requiring new authority to the attorney. He has no general authority to accept service of an order to show cause in proceedings against the party for contempt. Personal service is necessary." (Weeks Attys. [2d ed.] § 243; *Pitt v. Davison*, 37 Barb. 97.) It is true the appellant was not adjudged in contempt. An entirely different order was made from the one contemplated in the show cause order. The person upon whom it is claimed the service was made had no way of knowing before the hearing the nature of the order to be asked for. In a case where service upon an attorney can be properly made, the notice ought to be so definite that a reasonable opportunity is given to oppose. Here the general prayer for relief did not give such notice. "Under a general prayer for relief upon a motion, every possible relief should not be granted, but it should be allied to what is asked for." (*Boston Nat. Bank v. Armour*, 50 Hun, 176, 177.) Appellant was required to show cause why he should not be adjudged in contempt. We do not think the order was akin to that asked by plaintiff. It follows, therefore, that it must be reversed, with costs.

WOODWARD, JENKS and MILLER, JJ., concurred; HIRSCHBERG, P. J., dissented.

Order reversed, with ten dollars costs and disbursements.

App. Div.]

Second Department, March, 1906.

CATHARINE HYNDS, Respondent, v. THE BROOKLYN HEIGHTS RAILROAD COMPANY, Appellant.

Second Department, March 2, 1906.

**Negligence — evidence of eruptions resulting from injuries to abdomen, when admissible under allegations of complaint.**

In an action to recover for injuries received by negligence, when the complaint alleges that the plaintiff was struck in the abdomen and injured and bruised there and internally, it is not error to admit proof that eruptions appeared on the abdomen when the same are shown to have been a development of the injury alleged.

HOOKEE, J., dissented, with opinion; HIRSCHBERG, P. J., concurring.

APPEAL by the defendant, The Brooklyn Heights Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 21st day of January, 1905, upon the verdict of a jury for \$6,000, and also from an order entered in said clerk's office on the 20th day of January, 1905, denying the defendant's motion for a new trial made upon the minutes.

The material allegations of the complaint appear in the dissenting opinion of HOOKEE, J., *post*.

*I. R. Oeland* [*George D. Yeomans* with him on the brief], for the appellant.

*George V. Brower*, for the respondent.

GAYNOR, J. :

The complaint lacks precision, but in its bungling way (which we have to overlook in pleadings nowadays) it alleges that the plaintiff was struck in the abdomen and bruised, blackened and injured there, and internally. The plaintiff described the severe pains she suffered in the abdomen from the time of the accident and eruptions like blisters that came out on her abdomen. These latter were objected to as not pleaded. Enough was pleaded to cover all pains, discolorations, swellings and eruptions or blisters of the abdomen. That the doctors gave such eruptions and blisters a scientific name and said they were caused by the abdominal pain did not make proof of

them erroneous on the ground they were not within the issue. They were necessarily mentioned in describing the progress and development of the hurt to the abdomen.

The judgment should be affirmed.

WOODWARD and JENKS, JJ., concurred; HOOKER, J., read for reversal, with whom HIRSCHBERG, P. J., concurred.

HOOKER, J. (dissenting):

The plaintiff has a verdict in this action for personal injuries, and the defendant, to support its appeal, urges that error was committed by the trial court in allowing proof of inflammations and eruptions on the plaintiff's abdomen, because they were not pleaded. The allegation in the complaint is that the plaintiff was struck violently in the abdomen by the turnstile maintained by the defendant, "bruising her and leaving her in a dazed condition from the pain; that her person was severely bruised and blackened on the outer part of the abdomen by the injury, and she was injured internally, so that by reason thereof she was for several weeks confined to her bed and rendered helpless, suffering great pain; that she received a severe nervous shock to her nervous system; that she suffered and still suffers great pain by reason of said injury, and will suffer in the future; that her general health has been impaired and a serious internal injury to her intestines has been caused thereby, and which will in all probability prove permanent." The plaintiffs' medical experts testified that the inflammation and eruptions were diagnosed as *dermatitis herpetiformis*; that this disease was produced by the plaintiff's long-continued nerve-racking pain, and that the long-continued nerve-racking pain was the result of the injuries to her abdomen sustained by contact with the arm of the turnstile. The *dermatitis herpetiformis* did not develop until some eight months after the accident, during most of which time she had, as a result of her primary injury, suffered intense pain almost continuously. It is evident, therefore, that the skin trouble was not an immediate and natural consequence of the injuries. Proof of the condition should not have been allowed, in the absence of special averment of such damage. (*Kleiner v. Third Ave. R. R. Co.*, 162 N. Y. 193; *Sealey v. Met. St. R. Co.*, 78 App. Div. 530.) The complaint alleged the injury to the abdomen; it alleged her helpless condition,

App. Div.]

Second Department, March, 1906.

the pain she suffered, the nervous shock she sustained and general impairment of her health, all of these being doubtless the immediate and not unnatural consequences of the injury. The complaint is silent, however, in relation to the inflammation and eruption, which, it is evident from the testimony, are the result of the long-continued pain and not the immediate result of the blow upon the abdomen.

The judgment and order should, therefore, be reversed and a new trial granted.

Judgment and order affirmed, with costs.

---

WILLIAM A. LEGGETT and Others, Appellants, v. JULIA FLORENCE SCHWAB, Respondent.

Second Department, March 2, 1906.

**Evidence—when testimony of husband on supplementary proceedings is not admissible in subsequent action against wife.**

Evidence given by a husband in supplementary proceedings brought against him, which tends to show that his wife was the real debtor, is not admissible in a subsequent action against the wife, even though she was present at the supplementary proceedings and did not dispute the evidence.

The rule of admission by silence of the truth of statements made in one's presence does not extend to evidence given in judicial proceedings.

HOOKE, J., dissented, with opinion.

APPEAL by the plaintiffs, William A. Leggett and others, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Orange on the 14th day of April, 1905, upon the dismissal of the complaint by direction of the court after a trial at the Orange Trial Term, and also from an order entered in said clerk's office denying the plaintiffs' motion for a new trial made upon the minutes.

Action for the price of goods sold. Judgment was first obtained against the defendant's husband therefor. He was examined in supplementary proceedings thereon before a referee, and she was then examined therein as a witness, having been subpoenaed by the judgment creditor. She was present and heard her husband testify.

On the trial of this action the evidence of her husband before the

said referee was offered by the plaintiff and excluded. The excluded evidence tended to show that the goods were sold to her.

*John Miller*, for the appellants.

*Graham Witschief*, for the respondent.

GAYNOR, J.:

The evidence of the husband given in supplementary proceedings was offered by the plaintiff on the theory that it was an admission by this defendant, for the reason that she did not contradict it when she heard her husband give it before the referee. The rule of admission by silence of the truth of statements made in one's presence extends only to cases where the court can say that the natural and reasonable inference from silence is admission, and for that reason it does not extend to evidence given in judicial proceedings. It is not to be expected that one will get up and contradict a witness on the stand, or that he will do more than answer questions if he be subsequently called as a witness himself (1 Greenl. Ev. § 197, and notes). That the tribunal is not a high or imposing one does not make a difference. The same orderly course of procedure belongs there. I suppose, also, that coverture may stand in the way of the rule applying, for it would hardly be natural and reasonable for a wife to get up in court and brand her husband as a perjurer. Indeed, if she even chides him on getting home it will only be out of the same love and affection which made her naturally and reasonably keep still in court. Every woman is not a Jeanie Deans.

The judgment should be affirmed.

JENKS, RICH and MILLER, JJ., concurred; HOOKER, J., read for reversal.

HOOKER, J. (dissenting):

This is an action for goods, wares and merchandise sold and delivered. The answer is a general denial. Before this action was commenced the plaintiffs recovered judgment for the value of the same goods against the husband of this defendant. He was examined in supplementary proceedings, and upon evident failure to collect the judgment this action was commenced. Upon the supplementary



App. Div.]

Second Department, March, 1906.

proceedings both this defendant and her husband, the defendant in the case which had proceeded to judgment, were examined as witnesses. The testimony of the defendant at that time was as follows: "I have heard my husband's testimony. I own the furniture in the barber shop and upstairs. I get from my husband or from the drawer of the shop whatever money I want. I know nothing about the cigars for which this judgment was obtained. I have an income aside from the shop. I own real estate in Jersey City. The income is from 30 to 35 dollars a month. What money I get from the shop I use for my children and myself." The plaintiffs then offered to read the testimony of the husband taken before the referee in supplementary proceedings. This was objected to by defendant's counsel, who stated: "That raises the only question there is in this case. The situation is this. These people appeared before Mr. Thompson as referee and upon the examination Mr. Schwab in the presence of Mrs. Schwab made certain statements as to agency, which we contend are not competent against her. They contend that she is estopped because she was present and heard the testimony and made no denial. The fact that he was upon the witness stand is sufficient to remove the case from any question of estoppel because of the fact that she was present and did not deny it. We object to this evidence taken before Mr. Thompson as to the testimony of Mr. Schwab. The testimony of Mrs. Schwab we do not object to."

Under the circumstances disclosed, I am of opinion that the exclusion of the testimony of the defendant's husband was error, and that if it contained what was claimed for it, a question of fact would have been presented for the jury's consideration as to defendant's proprietorship of the business, for whose benefit plaintiffs delivered the merchandise.

The general rule as to the reception of vicarious admissions is that where a third person's statement is made in the presence of a party, the latter's silence implies assent to the correctness of the communication, where the statement is made under such circumstances by such persons and is of such a character as naturally to call for a reply, if he did not intend to admit it; or, in other words, silence is not evidence of admission unless there are circumstances that render it more reasonably probable that a man would answer the charge made against him than that he would not.

A well-recognized exception to this general rule is, however, that where the statements are made in the course of a judicial proceeding, even though the party sought to be bound is present and hears them, the latter's silence will not render the statements admissible. In *Melen v. Andrews* (M. & M. 336) the testimony of a witness on a former trial there offered against the plaintiff, who heard the former evidence, was excluded, the court saying: "It is true that the plaintiff might have cross-examined or commented on the testimony; but still, in an investigation of this nature, there is a regularity of proceeding adopted which prevents the party from interposing when and how he pleases, as he would in a common conversation. The same inferences therefore cannot be drawn from his silence, or his conduct in this case, which generally may in that of a conversation in his presence." The reason for the exception is that the inference, if any, would arise from the party's failure to speak out informally at an improper time, where an interruption to deny would violate the decorum of the occasion. (See *Wigmore Ev.* § 1072.)

The present case, however, is not within the exception, and the reasoning which commends this exception does not obtain here. The defendant heard the statements of her husband; she was in company with him at the office of the referee in supplementary proceedings; no lawyer represented her or him, and they were both examined by the attorney for the judgment creditors. She had heard the statements that she was the principal and her husband the agent, and it is probable that had the proceeding gone no further her silence would not have rendered competent her husband's statements, for she would not have been permitted with propriety to interrupt the orderly examination of her husband as a witness. The feature of the case, however, was that she was herself called as a witness, and then had every opportunity to deny or to disavow the statements of her husband, and it would not only not have been improper for her to have done so, but it would have conformed strictly with the proprieties of the occasion and her own interest, had such been the case, for her to have stated her lack of assent to his language. Where one does not offer his own testimony in civil cases to contradict the facts established by the evidence against him it is proper to draw the inference that he could not truthfully deny

App. Div.]

Second Department, March, 1906.

were he to speak upon the subject. This is the rule that should apply to the questions presented by this record; the testimony of the plaintiff's husband given in supplementary proceedings should have been received as bearing upon the question of his agency for his wife as undisclosed principal. Such a vicarious admission would have been some evidence to take the case to the jury upon the question of the defendant's liability, and would have rendered a nonsuit improper.

The judgment should, therefore, be reversed and a new trial granted.

Judgment affirmed, with costs.

---

ALFRED WAHRMAN, by ADOLPHUS ROTHMILLER, His Guardian ad Litem, Respondent, v. THE CITY OF NEW YORK, Defendant, Impleaded with THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, Appellant.

Second Department, March 9, 1906.

**Negligence**—when the board of education of the city of New York is liable for injuries received by a pupil by fall of ceiling in school building—said board liable for negligence—said board liable as master for acts of its subordinates.

As the charter of the city of Greater New York makes the board of education of said city a separate corporation, and vests said board with the title to real estate used for school purposes, with power to alter, repair and inspect said school buildings through subordinates appointed and controlled by it, said board is charged with the duty of repairing said buildings and keeping them in a safe condition, and is liable for its negligence in failing to do so. Said board also occupies the relation of master and servant with its subordinates appointed by it and under its control and direction.

Hence, when a pupil has been injured by the fall of a ceiling in a school building in said city, and it is shown that an inspector of the defendant had for some years noted the defective condition of the building, the sagging of the ceilings, etc., and had reported the defects several times to said board, the board is liable for the injuries received by said pupil, if the plaintiff on his part was free from negligence contributing to the injury.

APPEAL by the defendant, The Board of Education of the City of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of

Kings on the 6th day of March, 1905, upon the verdict of a jury for \$4,000, and also from two orders entered in said clerk's office on the 9th day of March, 1905, respectively, denying the said defendant's motion for a new trial made upon the minutes, and granting the plaintiff's motion for an extra allowance.

*James D. Bell* [ *William Hughes* and *John J. Delany* with him on the brief], for the appellant.

*Edmund Fletcher Driggs*, for the respondent.

RICH, J. :

The plaintiff, an infant twelve years of age, has recovered a judgment for a personal injury sustained on May 27, 1904, while attending a public school in the city of New York, caused by plaster of the ceiling of the schoolroom falling upon him. It is not disputed that he was a scholar attending the school; that the plaster fell upon him, inflicting a very severe and permanent injury, and that he was without fault.

It is contended by the appellant that it cannot be held liable for the negligence of its servants or agents in allowing scholars to occupy an unsafe school building, and the condition that occasioned the accident was not such an apparent defect as to constitute notice of danger sufficient to charge the defendant with negligence.

At the close of plaintiff's case and again at the close of the evidence, the appellant moved to dismiss upon the grounds, *first*, that the plaintiff had not shown that at the time of the accident nor for several months before it, there was any condition of the school building that constituted negligence on the part of the board of education, or any of its subordinates, or that gave them any notice or idea that it was dangerous to have scholars there, and, *second*, that the appellant was not responsible for any of the acts of its subordinates, and that the doctrine of *respondet superior* does not apply to the appellant; that there was no evidence to connect the board of education with any obligation to do anything to this building to put it in condition, and also that in no case of this kind is the board of education responsible for the tortious acts of any of its officers or agents. The motions were denied and exceptions taken.

App. Div.]

Second Department, March, 1906.

The learned trial justice charged the jury: "If you find that the board of education was guilty of negligence in permitting the occupation of this room by the pupils of this school on the 27th of May, 1904, by reason of the condition of the ceiling, and what they knew or ought to have known as to its condition, then the plaintiff is entitled to recover. The negligence which is the basis of the right to recover, if any, is the negligence in permitting it to be occupied for the purposes of a schoolroom. Their own inspector says that he had inspected it two days before, and every week prior to that, and he admitted that the ceiling would not be expected to fall unless it showed evident indications of being about to fall for a considerable period before the thing actually occurred. In view of all the evidence in the case, you must determine whether the board of education, remembering that it acts in this matter by its servants, knew or ought to have known of the probability of this accident, and to have closed the door of that room to the pupils on that day. If you find that they were in that respect negligent, then they are liable."

No requests for additional instructions were made; to so much of the charge as instructed the jury "that if the board of education is liable through the acts of its servants plaintiff may recover" the appellant excepted.

These exceptions present the only questions for our consideration.

There is sufficient evidence in the case warranting its submission to the jury. It appeared from the evidence that in 1901 an inspector of appellant had ascertained that the building in which this accident occurred had sagged in the center, causing the ceilings to sag and the roof to expand; the floors had sagged and the ceilings under the floors; he reported this condition to the defendant. The same inspector inspected the building again in 1903 and found the ceilings and side walls were cracked; the ceilings sagged the same as in 1901; the longitudinal girders supporting a portion of the beams were deflected and twisted, causing the sagging of the partitions and cracking of the plaster of the walls and ceilings, and the building was apparently settling all the time. He testified that these conditions would cause the plaster of the ceilings at some time to fall. The walls supporting the roof had been forced outward so as to entirely break the brick bond at the upper line of the floor

beams, and the rafters had spread so as to break the bond of the brick work on an entire line. These conditions he also reported to the defendant. The principal of the school had frequently, during the year 1903, made reports to the appellant in reference to the condition of the building. In December of that year a portion of the plaster in the same room in which plaintiff was injured had fallen, and that fact he had reported to the appellant. He testifies that he had made special efforts ever since he had been there to better the condition of the building, and had reported several falls of plaster from ceilings which had not resulted in injury to pupils; finally, at his particular request, as he testifies, "to make the whole building safe," a contract was made for repairs and work was commenced late in the fall of 1903, and had not been completed at the time of the accident. An inspector of repairs was present every day in charge of the work, and the work was in progress when the plaintiff was injured. An inspector named Lord had inspected the building in the early part of February, 1904, took note of all the bad features, and found that there were several spots in the ceilings not in good condition, and he reported these to the superintendent of school buildings.

An inspector of repairs of school buildings is not named in the charter of the city of New York. He was, however, undoubtedly employed or appointed and his duties specified by the appellant under the provisions of the charter to which attention will be directed later.

It was a question for the jury to determine whether the appellant knew or ought to have known that the room in this school building was unsafe and its occupancy dangerous by reason of the condition of its ceiling; whether a careful and proper inspection and examination by its inspectors would have given it this knowledge, and, if it would, whether they were negligent in permitting its occupancy by children during the time repairs were in progress, and the question was properly submitted to them by the trial justice, providing, of course, that the appellant could be held liable for its negligence or the negligence of its servants and employees to whom it had trusted the inspection and supervision of its schoolhouses.

Did the appellant owe plaintiff any duty in respect to the con-

App. Div.]

Second Department, March, 1906.

dition of repair of this schoolhouse? Section 1055 of the Greater New York charter (Laws of 1901, chap. 466) provides that the title to all property, real and personal, owned or acquired for school or educational purposes (except the State Normal School at Jamaica), as well as the title to all property purchased for school or educational purposes, whether derived from the issue of bonds or raised by taxation, shall be vested in the city of New York, *but shall be under the care and control* of the board of education for the purposes of public education, recreation and other public uses in said city, and suits in relation to such property must be brought in the name of the board.

By section 1060 the board of education is required to administer all moneys appropriated or available for educational purposes in said city.

Section 1061 vests in the board the management and control of the public schools and of the public school system of the city subject only to the general statutes of the State relating to public schools and public school instruction and to the provisions of the charter.

By section 1062 the board is given, for the purposes of the charter, the powers and privileges of a corporation.

By section 1067 the board is given power to appoint and fix and regulate within the proper appropriation the salaries and compensation of a number of officers, including the power to appoint a "superintendent of school buildings," who is required to be an architect of experience, and it may remove such officers at any time for cause.

Section 1068 gives such board power to enact by-laws, rules and regulations for the proper execution of all duties devolved upon it, its members and committees and upon the several local school boards; for the transaction of all business; "for defining the duties of \* \* \* the superintendent of school buildings" and its other subordinates.

Section 1071 requires the board to make provision for the organization in the various boroughs of such branches as they may deem necessary in the bureau of the superintendent of school buildings, and to make such provisions by its by-laws "as will secure prompt and efficient service \* \* \* for the alteration and repair of existing buildings, \* \* \* and for the execution

and carrying into effect of all matters and things, *authority for which shall have been granted by the board.*" The section then provides: "Subject to such by-laws, the superintendent of school buildings shall be the executive officer of the board in respect to all matters relating to the bureau of buildings, or in respect to which he is charged with duties under the provisions of this act. He shall advertise for bids for the erection, alteration *or repair* of any building to be used for educational purposes in The City of New York *which has been authorized by the board of education.*"

Section 1073 authorizes the superintendent of school buildings to appoint a deputy for each of the boroughs in the city, and, "*with the authority of the board of education*, he may empower a deputy superintendent in his place and stead to execute all the duties of superintendent *and such other duties as the board of education may, by regulation, prescribe.*" The section then provides: "All plans for new school buildings, for additions to school buildings, and for structural changes in old buildings, shall be passed upon and must be approved by the superintendent of school buildings, *who shall submit such plans to the board of education, whose action thereon shall be final.*"

Section 1078 requires the city superintendent of schools to visit the schools as often as he can consistently with his other duties, and inquire into several matters, among which is "the condition of the school-houses," which he is required to report to the board. The same duty, under the supervision and direction of the city superintendent, is devolved upon the district superintendents by section 1080. They are required by that section to report the results of their inquiry to the city superintendent, who is by that section directed to transmit such parts of said reports as he may consider necessary or proper to the board of education and to the local school boards of the districts for which the same are made. Provision is made by section 1087 for the division of the city into local school board districts by the board of education and for the appointment by the presidents of the respective boroughs, the designation by the president of the board of education and the assignment by the city superintendent of schools, of local school boards, among whose duties, as defined by section 1088, is that of visiting at least once in each quarter all the schools in their district and inspect the same in



App. Div.]

Second Department, March, 1906.

respect to "the cleanliness, *safety*, warming, ventilation and comfort of school premises," and they are required by section 1088 to "call the attention of the board of education, without delay, to every matter requiring official action. \* \* \* They shall also recommend \* \* \* *such repairs* or alterations of school buildings as they deem necessary or desirable."

From these provisions it is apparent that the appellant has the possession and absolute control and management of all school buildings in the city of New York and is charged with the duty of repairing and keeping them in proper repair and safe condition. It appoints, employs and prescribes the duties of all subordinates by whom this work and supervision is to be done and exercised, establishes and pays their compensation and is vested with the power of removal, which it may at any time exercise for cause. They are under the sole control of the appellant and accountable to it for the manner in which their duties are discharged. Charged with this duty and possessed of these powers, the relation of master and servant exists between the appellant and such of its subordinates.

It is the settled law of this State that in reference to its system of public education the municipal agencies of the State act for the sovereign and are not accountable in damages for the negligent manner in which they discharge their governmental duties or for the manner in which they carry on their work, unless other duties are also violated, but the plaintiff's case does not rest upon the assumed governmental obligation to benefit the public by education but upon the local and ministerial duty resting upon the appellant and all other persons and corporations who possess and manage property upon which buildings are erected and maintained, to keep them in such reasonably safe condition that persons exercising care will not be injured while in them whether by necessity or invitation.

The cases cited by the learned counsel for the appellant establish the well-known proposition that the city of New York is not liable for the negligence of the board of education, its officers or employees, in their management and care of school buildings, but they do not sustain the contention that this appellant is not liable.

In *Donovan v. Board of Education of City of N. Y.* (85 N. Y. 117) it was held that the defendant was not liable because the statutes then in force committed the care and safekeeping of school prem-

ises to ward trustees to whom was also given the power to appoint janitors and make repairs. The repairs being made at the time of the accident were ordered by the ward trustees who employed the workmen and had appointed the janitor of the building. The negligence alleged was that of the janitor or masons employed in doing the work. The defendant neither employed nor appointed them or had power to control or discharge them. They were public officers with powers prescribed by the statutes which they were then exercising; they were not the agents, servants or employees of the defendant, and the court held that in making repairs, employing workmen and appointing janitors the ward trustees acted as independent public officers; that the relation of master and servant did not exist between them and the board of education and for their acts or negligence the board was not liable.

In *Brown v. City of New York* (32 Misc. Rep. 571) the court declared the general rule that the city is not liable for the negligence of its board of education created by statute and thereby made solely responsible for the care and control of school buildings, which law was recognized by the trial court in this action and the complaint accordingly dismissed as to the defendant city. The same distinction exists in *Ham v. Mayor* (70 N. Y. 459). In neither of these cases is there any intimation that, upon the facts established in the case at bar, the board of education would not have been liable. It possessed and absolutely controlled the school building in which the injury was received; it was charged with the duty of maintaining and keeping it in a reasonably safe and suitable condition and free from danger to those lawfully in it, and for a failure to discharge this duty, or negligence in its performance resulting in an injury to a pupil attending school therein, free from negligence himself, it is liable. (*Galvin v. Mayor, etc., of New York*, 112 N. Y. 223, 226; *Vincent v. City of Brooklyn*, 31 Hun, 122; *Briegel v. Philadelphia*, 135 Penn. St. 451; *Carrington v. City of St. Louis*, 89 Mo. 208.)

The judgment and order must be affirmed, with costs.

HIRSCHBERG, P. J., and WOODWARD, J., concurred; JENKS and MILLER, JJ., dissented.

Judgment and order affirmed, with costs.

ANNA C. MORHARD, as Administratrix, etc., of FRANCIS LOUIS MORHARD, Deceased, Respondent, v. THE RICHMOND LIGHT AND RAILROAD COMPANY, Appellant.

Second Department, March 16, 1906.

**Negligence—death by electricity—defective transformer—evidence sufficient to sustain verdict for plaintiff—when verdict not excessive.**

The plaintiff's intestate, a man in previous good health, was found dead in the cellar of his house. On his breast and feet were found burns such as might have been caused by an electric current. His clothing was burned in the same places. An incandescent light with defective insulation was found lighted in the cellar. It was shown that the defendant on its primary circuit employed an alternating current of 2,400 volts, which entering a transformer affixed to a pole in front of the decedent's house was there converted into a current of 120 volts, which latter current would have been harmless. There was evidence showing that for some months prior to the decedent's death sparks had been seen about the transformer, and that on the night in question the transformer was surrounded by blue lights and sparks, and that a buzzing noise was heard. It was shown that after the accident the transformer was found to lack half an inch of insulation on one of the primary wires located within nine-sixty-fourths of an inch from the casing thereof, and that a current of 2,400 volts would jump such interval to the secondary circuit.

*Held*, that the defendant's negligence was properly submitted to the jury, and that a verdict that plaintiff's intestate was killed by the breaking down of the transformer which permitted the high tension current to enter the house because of defendant's negligence was supported by the evidence;

That as the deceased was a dentist earning from \$17,000 to \$20,000 yearly, and leaving a family of young children, a verdict of \$40,000 was not excessive.

APPEAL by the defendant, The Richmond Light and Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 30th day of November, 1904, upon the verdict of a jury for \$40,000, and also from an order entered in said clerk's office on the 9th day of December, 1904, denying the defendant's motion for a new trial made upon the minutes.

*Frank Harvey Field*, for the appellant.

*Herbert C. Smyth* [*Millard F. Tompkins* and *P. H. Delehanty* with him on the brief], for the respondent.

RICH, J. :

This appeal is by the defendant from a judgment in plaintiff's favor for \$40,000 for damages alleged to have been sustained in consequence of the killing of plaintiff's intestate. His death was caused, it is alleged, by his body coming in contact with a 2,400 voltage current of electricity which was negligently permitted to flow into the residence of the deceased by the defendant. At the time of the accident defendant was engaged in the business of supplying electricity to various customers at Giffords, in the county of Richmond, of whom the deceased was one. The electric current of 2,400 volts was delivered to a transformer placed upon a pole in front of his residence, by two primary wires carrying an alternating current. The office of the transformer was to reduce the 2,400 voltage of the primary circuit to 120 volts, and deliver this voltage of 120 to deceased's residence over a secondary circuit consisting also of two wires running from the transformer.

The case was tried by plaintiff upon the theory that the transformer was in an imperfect condition, and that because of this condition a deadly voltage of electricity was permitted to pass over the pole of the secondary wire. Plaintiff's intestate was a strong man; he went into his cellar in perfect health, and was dead when found lying upon the cellar floor about an hour later. An electric lamp, suspended by an insulated cord, was lighted. His position was such as to indicate that he had fallen while engaged in lighting this lamp. It was suspended from a nail in the ceiling to which also was attached a wire hanging down supporting a swinging shelf. There was a burn between the fifth and sixth rib on the left side of deceased's body, and there was also directly over this a small hole burned in both the outer and undershirt worn by him at the time. Evidence was introduced tending to show that there was a burn on his left foot and also a burn in the stocking and slipper directly over this burn.

The burden of establishing that the accident was the result of defendant's negligence and that plaintiff's intestate was free from contributory negligence was upon the plaintiff, and the verdict will not be sustained unless plaintiff has made it appear with reasonable certainty that the injury was inflicted as a result of defendant's negligence. A jury cannot be permitted to arrive at a verdict by

App. Div.]

Second Department, March, 1906.

speculation or guesswork. (*Menzies v. Interstate Paving Co.*, 106 App. Div. 107.)

It appears that the wire attached to the droplight was defective and not properly insulated at the point where it came in contact with the wire sustaining the swinging or hanging shelf. This wiring was put in the house and maintained by the deceased, but was only intended to carry a voltage of 120, which was harmless. Defendant contends that it is more reasonable to suppose that deceased met his death as the result of injuries sustained by falling from a small box standing directly in front of the shelf, and that it is at best but a guess as to whether his death was caused by an electric shock, or a broken neck, occasioned by the fall. If this is correct, of course the verdict cannot be sustained. It has been held repeatedly, and is the law of this State, that where the damages have been inflicted by one of two causes, for one of which the defendant is responsible, and for the other of which he is not responsible, the plaintiff cannot succeed, where it is just as probable that the damage was done by one cause as by the other, but is the learned counsel correct as to the conclusion he reaches? It is true that the cause of death has not been established to an absolute certainty; no autopsy was held, and Dr. Hutchinson, a witness called by defendant, testified that: "In order to tell if a man has died from electric shock, in the first place an autopsy is necessary to eliminate absolutely every other cause of sudden death." Yet I think the evidence predominates in favor of plaintiff's theory. It appears that on the night of the accident, and at different times at night antedating the accident, the transformer had been observed to have been surrounded by blue lights and sparkling, and that a buzzing noise was at times observed resembling rapid hammering; that on the evening of the accident a blue light was observed where the primary wires came in contact with the trees. The transformer was taken from the pole by the defendant after the accident, but was produced upon the trial, and evidence is given that it was tested after the accident and worked properly. It appeared, however, that about one-half of an inch of the insulation was gone off the primary wire in the transformer in one place, and that this bare wire was about nine-sixty-fourths of an inch from the iron transformer case. The pole to which this transformer was attached

was wet; evidence was given tending to show that 2,400 volts will jump in the open air from one wire to another two-sevenths of an inch away, and the greater the voltage the greater distance the voltage will jump. Expert evidence was given tending to show that the primary current got on the secondary circuit through the transformer, and in support of this theory our attention is called to the fact that besides the noise and blue light emanating from the transformer, upon the night of the accident blue lights were observed on the secondary wire leading from the transformer to the house; also that lights in the house were unsteady, at times giving a very bright light, brighter than usual, and then that they would go out entirely, which indicated, the experts testified, that the wires were instantaneously short circuited and that a ground might be effected through the wooden pole which was wet. Professor Sever testified that these phenomena indicated "that there was some break down in insulation." The learned counsel for the appellant admits in his argument that if "manifestations of electrical energy, as described by the witnesses, came from the secondary circuit, there must have been a high voltage current in the secondary circuit." Evidence was given on the part of plaintiff that standing on the cellar floor, in reaching up to turn on the light, the wires at the point where they were attached to the shelf would touch over the region of deceased's heart. His shirt showed a burn corresponding with the apex of his heart, where the burn on the body was found. Experts gave it as their opinion that deceased received a shock from a high potential current of nearly if not the entire electric force of the primary circuit. It appears, however, that from 200 to 220 volts in the secondary circuit, upon both legs of the circuit, would burn out all lights in the house because of the high potential force. The fact that the lamps did not burn out is explained by an expert who gives it as his opinion that the voltage was connected with but one leg of the secondary circuit. He says: "The deceased came in contact with one leg on the secondary circuit, and in that way got the entire voltage or very nearly the entire voltage of the primary." He admits that if the primary circuit had been connected to both legs of the secondary that the fuses would have blown or all the lamps would have gone out. The fact that the lamps did not go out is a positive manifestation that the current,

App. Div.]

Second Department, March, 1906.

the high potential, did not go on both legs of the secondary circuit. "That is also shown by the fact that only one of the wires, the insulation of one of the wires is burned off." I must confess my inability to understand how there could have been any light in the house if the power was not connected with both legs unless this great potential force was instantaneous. Mr. Southard stated: "The fact that the lights in the house did not blow out but remained lit indicated first that the circuit fuses in the primary did not blow out. From the fact they did not blow out when this occurrence took place, why, there was not sufficient amount of current drawn to blow the fuse, and also that the application of the current was not of long enough duration to heat the fuses up sufficiently to blow them. The doctor could have only been in contact a very short space of time, as indicated in the outer shirt, the puncture on the outer shirt, the other shirt, the stocking and slipper, \* \* \* the burning there would continue after the current was actually through going through his body, due to the fact that woolen will smoulder and will burn."

There was sufficient evidence to warrant the submission of the question of defendant's negligence to the jury. Defendant maintained this primary circuit, charged with an alternating current of 2,400 volts. This was a deadly force and it was defendant's duty to exercise a high degree of care to protect the deceased from this current. (*Caglione v. Mt. Morris Electric Light Co.*, 56 App. Div. 191.)

It appears that the primary wires were in contact with trees, and that sparks and blue light were observed at the transformer for some months before the accident, and yet no examination was made of the transformer.

The jury found, after a fair and impartial charge by the learned trial justice, that plaintiff's intestate was killed by reason of a breaking down of the transformer, which permitted the high potential force of electricity to enter the house of the deceased; that this was due to the negligence of the defendant; that deceased was free from any negligence which contributed to his death, and the verdict is supported by the evidence. Deceased was thirty-seven years of age at the time of his death; he was a dentist, and his income from his dental profession was shown to have been from \$17,000 to \$20,000

a year. He left three children, the eldest being eleven years of age, besides a posthumous child born six months after his death. We do not think the verdict was excessive, under the circumstances.

The exceptions have been examined with care, and we find none warranting a reversal.

The judgment and order must, therefore, be affirmed, with costs.

Present—HIRSCHBERG, P. J., WOODWARD, JENKS, RICH and MILLER, JJ.

Judgment and order unanimously affirmed, with costs.

---

THOMPSON-STARRETT COMPANY, Appellant, v. BROOKLYN HEIGHTS REALTY COMPANY, Respondent.

Second Department, March 16, 1906.

**Mechanic's lien — no lien for tearing down buildings under contract to erect other buildings — no recovery on quantum meruit may be had in an action on a mechanic's lien when the lien not established — when architect's certificate necessary.**

A builder under contract to erect a building in the place of old buildings to be demolished by him, and who has merely razed the old buildings and reaped a profit from the sale of the materials to a sub-contractor, but has not in any way performed his contract to build, except to draw plans, is not entitled to a mechanic's lien on the breach of the contract by the owner. The demolition of the old buildings is not the performance of labor for the "improvement of real property" within the meaning of the Lien Law. In an action to foreclose such lien the complaint is properly dismissed and there can be no recovery on a *quantum meruit* under section 3412 of the Code of Civil Procedure, for no personal judgment can be had under said section without establishing some portion of the lien.

The plaintiff in such action must fail when he does not allege and prove the issuance of an architect's certificate required by the contract as a condition precedent to payment.

APPEAL by the plaintiff, the Thompson-Starrett Company, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 6th day of May, 1905, upon the decision of the court rendered after a trial at



the Kings County Special Term dismissing the complaint upon the merits.

*Charles L. Kingsley*, for the appellant.

*John Hill Morgan*, for the respondent.

RICH, J. :

This is an appeal from a judgment dismissing the plaintiff's complaint. The action was brought to foreclose a mechanic's lien. The defendant was the owner of real property in the borough of Brooklyn, upon which were old buildings. On March 9, 1904, it entered into a contract with the plaintiff, in which the latter undertook and agreed to furnish all the materials and perform all the labor necessary and required for the erection and completion of an apartment hotel upon said premises for the sum of \$892,500. Under the provisions of this contract the plaintiff caused the buildings to be torn down and removed, receiving therefor, from a sub-contractor, \$3,500, without incurring or paying any expense in connection with such work. The contract was silent in regard to the ownership of the materials in such buildings after demolition, but it was established on the trial that when a building contract was silent on such subject all materials in the buildings torn down belonged to the contractor. The plaintiff caused plans for the proposed new building to be made by its employees, during the preparation of which an engineer, in plaintiff's employ, went to the site, examined the buildings and condition of the earth to determine the weight and style of the foundation to be constructed, and also examined a party wall between the old building and an adjoining one that had to be cared for and guarded against injury in excavating by plaintiff. This was done to learn existing conditions in order to intelligently make the required plans for the new building. Aside from this nothing was done by the plaintiff under the provisions of the contract.

The defendant was required, when the buildings were "razed to the ground" to pay all existing incumbrances upon the property and execute a bond secured by a first mortgage thereon, in favor of plaintiff or any person it might designate, in the sum of \$800,000; to pay \$50,000 when the steel work was erected to a height of four stories, and \$42,500 when all the steel frame was up. The defend-

ant was unable to perform its agreement to pay the existing mortgages on the property, and the plaintiff thereupon filed the mechanic's lien, to foreclose which this action was brought.

The memorandum opinion of the learned trial justice is as follows: "Plaintiffs have a claim against defendant for breach of contract, but cannot foreclose it in this lien action, because the making of plans for building gives no lien. (*Rinn v. El. Power Co.*, 3 App. Div. 305.) The tearing down of a building gives no lien; in this case plaintiffs have been more than paid for that work. As there could not be a lien, there can be no personal judgment. (*Mowbray v. Levy*, 85 App. Div. 68.) Judgment for defendant, with costs." In this conclusion we think he was clearly right. There is nothing in the case under consideration tending to remove it from the principle declared in *Rinn v. Electric Power Co.* (3 App. Div. 305) that the simple preparation of plans and specifications gives no right to a lien, and is not embraced within the Lien Law of the State, with the exception of the fact that in order to qualify himself for the proper preparation of such plans plaintiff's engineer visited the premises and inspected the building, ground and adjoining party wall, and the tearing down of the buildings, which does not constitute such an active participation in the manual functions of the construction of a proposed building as to take the case out of the operation of such principle. There was no construction in fact of any kind; the excavation for the foundation was not even done, consequently there was no supervision or superintendence of construction; all that was done was the preparation of the plans, the tearing down of the old buildings and removal of the materials of which they were composed. There is an entire absence of the "concurrence of plans and superintendence" upon which liens were sustained in the cases to which our attention is directed.

The plaintiff contends that the demolition of the old buildings is the performance of labor for the "improvement of real property" within the meaning of the Mechanics' Lien Law (Laws of 1897, chap. 418, art. 1), and makes its lien, to the extent of the value of such work, valid and enforceable; and being valid in part authorizes and entitles it to a personal judgment for the damages it has sustained by defendant's breach of contract. But this contention overlooks the fact that for such services the plaintiff incurred no expense

whatever and actually received \$3,500 over and above the value of such labor. For such work there was nothing due it from the defendant, and there being no debt of the owner there can be no lien upon the owner's land. The contention of the plaintiff overlooks the further fact that the statute referred to defines the word "improvement" as being "work done upon such property, or materials furnished, for its *permanent improvement*." The tearing down of an old building can hardly be said to permanently improve the naked land. I do not think that it was within the intention of the lawmakers that such work should give the person performing it a lien, and such a construction of the statute is not warranted. While the plaintiff may have a cause of action against the defendant for a breach of contract, and be entitled in such action to recover the damages it has sustained, such cause of action furnishes no basis for a lien and gives no right of recovery in this action.

The appellant also urges that it was entitled to recover in this action upon a *quantum meruit*, its complaint alleging the existence and breach of a contract by defendant, without fault on its part, and that the reasonable cost and value of the labor done and performed by it was \$2,500. In support of this contention section 3412 of the Code of Civil Procedure and *Shirk v. Brookfield* (77 App. Div. 295); *Boyd v. Vale* (84 id. 414), and *Baumann v. Manhattan Consumers' Brewing Co.* (97 id. 470) are cited.

There is no question of the correctness of the principle declared in these cases, but it is not applicable to the case at bar, for the reason that before it could avail the plaintiff it must have been established that some portion of the lien sought to be enforced was valid and enforceable, in which event a personal judgment for the balance due and unpaid might properly have been rendered, and the case is barren of such evidence. This court has held that where no valid lien is acquired a personal judgment is not authorized by the section of the Code cited. (*Mowbray v. Levy*, 85 App. Div. 68.) If a personal judgment is not authorized there could be no recovery upon a *quantum meruit*. Were this not so the right to such recovery, given by section 3412 of the Code of Civil Procedure, is expressly limited to such sums as are due plaintiff, "or which he might recover in an action on a contract against any party to the action." Here again the plaintiff is confronted by an unsurmount-

able obstacle, for it failed to allege or prove upon the trial that it obtained of the architect the certificate required in the contract as a condition precedent to a right of payment, or that such certificate was reasonably withheld. The evidence, therefore, fails to establish that there was anything due from the defendant when the lien was filed, and the provisions of section 3412 of the Code of Civil Procedure do not aid or sustain plaintiff's contention.

No errors appear that would justify reversal, and the judgment must be affirmed, with costs.

HIRSCHBERG, P. J., JENKS, HOOKER and MILLER, JJ., concurred.

Judgment affirmed, with costs.

---

ANNIE STEVENS, Respondent, v. THE CITY OF NEW YORK, Appellant.

Second Department, March 9, 1906.

**Landlord and tenant—action for use and occupation after notice to vacate—when recovery limited to rental stated in lease.**

When a tenant, after notice to vacate, holds over, the landlord may treat him as a trespasser, or as a tenant for another year under the lease.

When a complaint in an action for use and occupation alleges that the tenant after such notice to vacate "by and with the consent of the plaintiff used and occupied said premises," an election to treat the defendant as a tenant is shown, and the recovery is limited to the rental stated in the lease.

When a complaint is framed for use and occupation with the consent of the landlord, without reference to section 200 of the Real Property Law, said section is not available in the action.

APPEAL by the defendant, The City of New York, from a judgment of the Municipal Court of the city of New York, borough of Brooklyn, in favor of the plaintiff, entered in the office of the clerk of said court on the 3d day of April, 1905.

*James D. Bell* [*Jerome W. Coombs* with him on the brief], for the appellant.

*Brussel & Beebe*, for the respondent.

MILLER, J. :

On the 1st day of January, 1898, the defendant entered into possession of certain premises as lessee of the plaintiff under a

App. Div.]

Second Department, March, 1906.

written lease for the term of two years at the stipulated annual rental of \$100, and continued in possession under yearly renewals until January 1, 1904. In December, 1903, the plaintiff gave the defendant written notice to vacate on January 1, 1904. Nothing further appears to have been done, the defendant continued in possession, and this action is brought for use and occupation for the year 1904, the plaintiff alleging in the complaint that "the defendant by and with the consent of the plaintiff used and occupied said premises," and the plaintiff has a judgment for \$250 based upon proof of the rental value of the premises, although the defendant, while conceding its liability to the extent of \$100, insisted upon the trial, as it now insists, that said sum stipulated in the lease was the measure of the recovery, and this appeal presents the single question whether the landlord who consents to the tenant holding over after the expiration of his term can recover more than the sum stipulated in the lease. Under the circumstances disclosed the plaintiff had the option to treat the defendant as a trespasser or as a tenant for another year upon the terms of the prior lease. (*Schuyler v. Smith*, 51 N. Y. 309.) This proposition is so firmly established that it is useless to multiply authorities. The plaintiff did not treat the defendant as a trespasser, but consented to the holding over. The lease, therefore, must determine this controversy.

The respondent is not aided by resort to section 200 of the Real Property Law (Laws of 1896, chap. 547). Without considering all of the reasons why this statute has no application to the present controversy, it is sufficient to say that the complaint is framed for use and occupation without reference to the statute, and that there is no proof that the holding over was willful within the meaning of the statute, while the complaint expressly alleges that it was with the consent of the plaintiff.

The judgment of the Municipal Court must be modified by deducting therefrom the sum of \$150, and as thus modified affirmed, without costs.

HIRSCHBERG, P. J., WOODWARD, GAYNOR and RICH, JJ., concurred.

Judgment of the Municipal Court modified by deducting therefrom the sum of \$150, and as thus modified affirmed, without costs.

CHARLES H. EBBETS and BERTHE C. CARRUTHERS, Composing the Firm of EBBETS & CARRUTHERS, Respondents, v. THE CITY OF NEW YORK, Appellant.

Second Department, March 9, 1906.

**Trespass — injury to property by water from sewer — rule of liability of municipality stated — negligence must be shown.**

In an action to recover damages for injury to property caused by water backing up through drains from a sewer during an unusual rainfall,

*Held*, that different conditions require the application of different principles in so-called sewer cases;

That the following rules as to municipal liability are established :

The duty of providing sewerage and drainage is *quasi*-judicial and in determining the necessity, location, capacity, etc., the officers upon whom the duty is imposed are required to exercise judgment and discretion, and no action lies at the instance of an individual for damages based upon either a failure to act or an error of judgment in acting; this principle, however, cannot be extended so as to grant immunity to municipalities for acts which result in the invasion of private property or the creation of public or private nuisances, and for a trespass or a nuisance committed by it such municipality must respond the same as any individual.

*Held*, further, that in such action the plaintiff cannot recover without some proof to sustain a finding of negligence on the part of the defendant, and the fact that traps might have been used which would have prevented the backing up of water under such unusual circumstances, did not show the negligence of the defendant, but, if anything, showed the negligence of the plaintiff.

APPEAL by the defendant, The City of New York, from a judgment of the Municipal Court of the city of New York, borough of Brooklyn, in favor of the plaintiffs, entered in the office of the clerk of said court on the 17th day of March, 1905.

*James D. Bell* [*James T. O'Neill* with him on the brief], for the appellant.

*Frank B. York*, for the respondents.

MILLER, J. :

The plaintiffs have recovered a judgment for injuries to property resulting from the flooding of their cellar caused by water backing up from the sewer through the house connections and into the cel-

App. Div.]

Second Department, March, 1906.

lar through open drains imbedded in the floor and supplied with traps to prevent the entrance of foul air, but not of water, although traps which would have made the entrance of water impossible were practicable and in use. It does not clearly appear what the relative levels of the sewer and the drains were, but it is fairly inferable that the drains were nearly on a level with the sewer, as one witness for the plaintiffs describes the drains as being of a "very low elevation." A rain storm had been in progress and during seven hours there had been a total rainfall of two and ninety-seven one-hundredths inches, and at one time during the morning when the flooding appears to have occurred rain fell at the rate of four inches per hour. The sewer in question drained an area of about three and six-tenths acres and had a capacity of one inch of rainfall per hour, and it was claimed that this would accommodate a rainfall of two inches per hour, it being explained that the other inch would be disposed of by evaporation and percolation. It was not claimed that the defendant had negligently suffered an obstruction to exist in the sewer, but the plaintiffs' theory appears to have been that the defendant was negligent in not having provided a sewer of sufficient capacity to provide for such a rainfall as occurred without causing the water to back up through the house connection into the plaintiffs' premises in the manner in which it did. It is claimed that upon one prior occasion there had been a slight overflow from the drains in the plaintiffs' cellar, but not of sufficient amount to cause any damage, and it is not claimed that the defendant had any notice or knowledge thereof.

Different conditions require the application of different principles in these so-called sewer cases, and the following propositions may be stated as firmly established by authority: The duty of providing sewerage and drainage is *quasi-judicial*, and in determining the necessity, location, capacity, etc., the officers upon whom the duty is imposed are required to exercise judgment and discretion, and no action lies at the instance of an individual for damages based upon either a failure to act or an error of judgment in acting (*Wilson v. Mayor, etc., of New York*, 1 Den. 595; *Mills v. City of Brooklyn*, 32 N. Y. 489; *Lynch v. Mayor*, 76 id. 60); this principle, however, cannot be extended so as to grant immunity to municipalities for acts which result in the invasion of private property or

the creation of public or private nuisances, and for a trespass or a nuisance committed by it such municipality must respond the same as any individual (*Seifert v. City of Brooklyn*, 101 N. Y. 136, containing a careful review of the authorities by RUGER, Ch. J.; *Clark v. City of Rochester*, 43 Hun, 271; *Mages v. City of Brooklyn*, 18 App. Div. 22; *Byrnes v. City of Cohoes*, 67 N. Y. 204; *Ahrens v. City of Rochester*, 97 App. Div. 480); having determined upon a plan the municipality then becomes liable for negligence either in construction or in care and maintenance. (*Mayor, etc., of City of New York v. Furze*, 3 Hill, 612; *Barton v. City of Syracuse*, 36 N. Y. 54; *McCarthy v. City of Syracuse*, 46 id. 194; *Smith v. Mayor*, 66 id. 295.) It seems clear that the rule applicable to the case at bar is that stated in *Smith v. Mayor* (*supra*), and that in the absence of some proof to support a finding of negligence the plaintiffs cannot succeed. This is not a case where the mere happening of the event cast the burden of explanation upon the defendant. Obviously under normal conditions there will be times when some backing up of water in the sewers will occur, and the mere fact that an overflow occurs from a drain not equipped with a proper trap, on nearly the same level as the sewer, during an unusual rain storm, is not sufficient to cast the burden on the defendant of disproving any negligence on its part; instead it tends to establish negligence on the part of the plaintiffs in thus constructing a drain. We may assume that the defendant is required to exercise ordinary care to guard against an overflow from sewers through house connections, and yet the law is not so unreasonable as to impose a liability in a case disclosing fault on the part of the plaintiffs but none on the part of the defendant.

The judgment of the Municipal Court should be reversed and a new trial ordered, costs to abide the event.

HIRSCHBERG, P. J., JENKS, HOOKER and RICH, JJ., concurred.

Judgment of the Municipal Court reversed and new trial ordered, costs to abide the event.



App. Div.]

Second Department, March, 1906.

KATE M. WADLEIGH, Respondent, v. THOMAS P. WADLEIGH and  
ELOISE WADLEIGH, Appellants.

Second Department, March 9, 1906.

**Creditor's bill — failure to show conveyance to be fraudulent — evidence  
— when deposition of grantor inadmissible against grantee.**

In an action by a divorced wife, who has been awarded alimony, to set aside a conveyance by her former husband to his second wife as in fraud of his creditors, there is a total failure to prove fraudulent intent when the plaintiff merely shows that her execution was returned unsatisfied, and that the conveyance was on the consideration of "one dollar, and other valuable considerations." The mere fact of a conveyance to his wife made by a man who is in debt, does not of itself establish fraud. There are two essential elements necessary to fraud: The insolvency of the grantor and the voluntary character of the conveyance. When insolvency is established the burden is on the grantee to show consideration. When both insolvency and want of consideration are shown, the fraud is established.

The use of the words "other valuable considerations" is not an admission that the consideration was nominal.

The return of an execution unsatisfied a year after the conveyance does not establish insolvency at the time of such conveyance.

Insolvency and indebtedness distinguished.

The deposition of the grantor on supplementary proceedings held after the conveyance is not admissible against the grantee.

APPEAL by the defendants, Thomas P. Wadleigh and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Westchester on the 17th day of March, 1905, upon the decision of the court rendered after a trial at the Westchester Special Term.

*Henry B. Ketcham*, for the appellants.

*A. Parker Nevlin* [*Henry Rutgers Conger* with him on the brief], for the respondent.

MILLER, J.:

Plaintiff has a judgment adjudging that a certain deed of real property from the defendant Thomas P. Wadleigh to the defendant Eloise Wadleigh was made with intent to hinder, delay and defraud the creditors of said defendant Thomas P. Wadleigh, which

the appellant Eloise Wadleigh insists is not sustained by any evidence competent as against her. The deed was made June 29, 1903, and contains a recital of a consideration "of the sum of one dollar, and other valuable considerations." The plaintiff's judgment, which is the foundation of this action, was rendered May 17, 1904, in an action commenced November 24, 1903, upon which an execution was issued, and on May 24, 1904, returned unsatisfied except in the sum of fifteen dollars. The judgment was for alimony awarded the plaintiff, formerly the wife of the defendant Thomas P. Wadleigh, by a Massachusetts decree of divorce granted May 16, 1894, which had been complied with by said defendant Thomas P. Wadleigh until August, 1897. It hardly seems necessary to argue that fraud cannot be predicated upon the foregoing facts, and there are no others proven by evidence admitted against said appellant Eloise Wadleigh. The mere fact of a conveyance by a husband, who is indebted, to his wife is not and never was sufficient to establish fraud. Two essential elements are lacking, the insolvency of the grantor and the voluntary character of the conveyance. If the fact of insolvency had been established it would then have been incumbent upon the appellant to prove that the conveyance was founded upon a good consideration, and that she had no knowledge of her grantor's intent to defraud (*Starin v. Kelly*, 88 N. Y. 418; *Billings v. Russell*, 101 id. 226; *Bailey v. Fransioli*, 101 App. Div. 140); *a fortiori* if both insolvency and want of consideration for the transfer had been proven, the plaintiff's case would have been conclusively established, but there is no evidence tending to establish either of said facts. The recital in the deed cannot be relied upon to show want of consideration, because the use of the words "other valuable considerations" cannot be construed as an admission that the consideration was purely nominal, and the entire recital, and not a part only, must be considered. The return of an execution partly unsatisfied a year after the conveyance does not tend to establish insolvency at the time of the conveyance in the absence of any other facts. (*Kain v. Larkin*, 131 N. Y. 300.) The deposition of the defendant Thomas P. Wadleigh, taken in proceedings supplementary to execution, was offered in evidence, but upon the objection of the defendant Eloise Wadleigh was received by the court as against said defendant Thomas P. Wadleigh only, and it is

urged that this evidence tends to establish that the conveyance was voluntary and that said Thomas P. Wadleigh was insolvent at the time and actually made it with intent to hinder, delay and defraud the plaintiff, and it is argued that the fraudulent intent of the grantor being proven, the burden was then cast upon the appellant Eloise Wadleigh to show the good faith of the transaction, within the authority of *Starin v. Kelly* (*supra*); but that case has no application to the facts of the case at bar. The proof of the fraudulent intent of the grantor, which will cast the burden on the grantee, must be supplied by evidence competent as against said grantee. The rule requiring a defendant to overcome presumptions arising from certain facts does not relieve the plaintiff from proving the facts warranting the presumption by competent evidence, nor impose upon the defendant the burden of disproving allegations having no support whatever in the plaintiff's case. Every fact which the plaintiff must establish must be proven by evidence competent as against the defendant sought to be charged, and the declarations of an alleged fraudulent grantor, made long after the conveyance, are not competent as against his grantee to prove either intent, insolvency or want of consideration. Authority hardly seems necessary for this proposition, but it is abundant. (*Cuyler v. McCartney*, 40 N. Y. 221; *Tilson v. Terwilliger*, 56 id. 273; *Burnham v. Brennan*, 74 id. 597; *Coyne v. Weaver*, 84 id. 386; *Kain v. Larkin*, *supra*; *Lent v. Shear*, 160 N. Y. 462.) The learned trial court was right in receiving this deposition only as against the defendant making it, and the case of said appellant Eloise Wadleigh must be considered as though it were entirely stricken from the record. There is no proof tending to show that said appellant had knowledge of any fact which should have incited a suspicion in her mind of a fraudulent intent on the part of her grantor. It does not even appear that she knew of the former marriage, let alone the decree of divorce and judgment for alimony; and in the absence of direct evidence tending to prove facts within her knowledge indicating fraudulent intent on the part of her grantor, the plaintiff cannot cast the burden of explanation upon her without some evidence tending to show his insolvency. Even if we were to assume, as we cannot, that the conveyance was voluntary, the mere fact

that the plaintiff was a creditor at the time is not sufficient to avoid it. (*Kain v. Larkin*, *supra*.) There is a marked distinction between indebtedness and insolvency. There is no rule which prevents a person from making such disposition of his property as he chooses, so long as he retains sufficient to satisfy his creditors, and whatever may have been the rule declared by the earlier decisions, it seems clear that the rule as now settled in this State casts the onus on the person assailing the deed of proving the insolvency of the grantor. Such is the rule declared in *Kain v. Larkin* (*supra*) by EARL, Ch. J., speaking for the entire court after a careful discussion of the subject and review of authorities. A slightly later case (*Smith v. Reid*, 134 N. Y. 568) seems to conflict with *Kain v. Larkin*, and announces the rule "that a voluntary conveyance by one *indebted* at the time is presumptively fraudulent." The case of *Kain v. Larkin* is not referred to in the prevailing opinion in *Smith v. Reid*, and in the latter case the rule announced was assumed to have been settled by cases which turned upon the question whether the grantor did in fact have sufficient property remaining to pay his debts. While the apparent conflict between *Smith v. Reid* and *Kain v. Larkin* does not appear to have been settled by the Court of Appeals, *Kain v. Larkin* has been followed by numerous cases, both in this and the first department of this court. (*Lewis v. Boardman*, 78 App. Div. 394; *Guy v. Craighead*, 40 id. 260.) Accepting *Kain v. Larkin* as authority, it seems clear that on no possible theory can the plaintiff be held to have made a case putting the appellant Eloise Wadleigh to her proof.

As to the appellant Eloise Wadleigh the judgment must, therefore, be reversed and a new trial granted, costs to abide the final award of costs.

HIRSCHBERG, P. J., WOODWARD, GAYNOR and RICH, JJ., concurred.

Judgment reversed and new trial granted, costs to abide the final award of costs.

App. Div.]

Second Department, March, 1906.

MORRIS ROSENFELD; Respondent, v. CENTRAL VERMONT RAILWAY  
COMPANY, Appellant.

Second Department, March 9, 1906.

Common carrier — no recovery on common-law liability of carrier under complaint setting out breach of express contract — recovery for tort not proper under complaint on contract — failure to show conversion.

A plaintiff suing for the breach of an express contract of a carrier to carry and deliver goods, who fails to prove said contract, cannot recover on the common-law liability of the carrier when such issue is not within the pleadings.

A defendant is not required to meet trial issues not presented.

The failure to prove the contract alleged is not a mere variance which allows a judgment based on the common-law liability of the carrier when no motion to amend is made at trial.

Such complaint setting out the breach of an express contract to carry does not authorize a judgment in tort under an allegation that "the defendant appropriated the said case of goods to its own use and benefit in disregard of the said agreement," when there is no proof of such conversion. Non-delivery without proof of wrongful disposition or withholding of property does not establish conversion.

APPEAL by the defendant, the Central Vermont Railway Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Queens on the 15th day of December, 1904, upon the verdict of a jury, and also from an order entered in said clerk's office on the 15th day of December, 1904, denying the defendant's motion for a new trial made upon the minutes.

*Martin S. Lynch*, for the appellant.

*Abraham B. Schleimer*, for the respondent.

MILLER, J.:

The plaintiff has recovered a judgment for the failure of the defendant, a common carrier, to deliver a case of goods to the consignee at the point of destination, and the appellant insists that although timely objection was made a recovery was allowed to its prejudice upon a cause of action not alleged. The complaint, as limited by the bill of particulars, alleges the breach of an express

contract made by the defendant in the city of Chicago to safely carry said case of goods and deliver it to the consignee at Montville, Conn., and in default thereof to pay its value, pursuant to which the plaintiff as owner is alleged to have delivered the same to the defendant. No proof whatever was offered of any express contract made by the defendant at Chicago or elsewhere, nor of the delivery of the goods to the defendant at Chicago, and it appeared without dispute that the defendant maintained no office in Chicago, had no agents or servants there, and that its line extended simply from New London, Conn., to St. Johns, Quebec. The plaintiff testified that he delivered the goods at the Union Line depot in Chicago (evidently meaning the Star Union Line) to a man on whose cap were the words "Central Vermont Railroad Company." In view of the undisputed evidence, this statement, even if true, was not sufficient to establish the agency of such person. It appeared that the Pennsylvania railroad controlled the freight of said "Star Union Line," and it is undisputed that the goods, if shipped at all, must have been shipped via the Pennsylvania railroad from Chicago to New York, and the New York, New Haven and Hartford railroad from New York to New London, from which point the defendant became the forwarder. The defendant received from the New York, New Haven and Hartford railroad at New London a quantity of goods consigned to one M. Winaker, Montville, Conn., and delivered the same to the plaintiff at said point of destination, but the defendant denied that the case, which the plaintiff claimed was contained in said shipment, was ever received by it. The plaintiff sought to establish the fact of possession of the goods in the defendant by his own testimony to the effect that he saw the case in a car at the defendant's station at Montville, and by alleged admissions contained in a certain expense bill given by the defendant's agent at Montville to the plaintiff. A portion of this evidence was objected to as contrary to the contract set forth in the pleadings and bill of particulars. The defendant's attorney stated in effect during the trial that he had prepared to meet only the cause of action alleged, and moved, both at the close of the plaintiff's case and of the entire evidence, for a dismissal on the ground that the cause of action set forth in the complaint and bill of particulars had not been proved. It must be

App. Div.]

Second Department, March, 1906.

manifest that the plaintiff was permitted to recover upon the liability which the defendant assumed as forwarder, whereas the complaint had distinctly alleged an express contract made by the defendant as initial carrier. While the respondent practically concedes that the complaint does set forth a cause of action for breach of such express contract, he seeks to sustain the judgment by the claim that the allegations of breach of contract may be rejected as surplusage and that the action may be treated as one sounding in tort. There is no allegation in the complaint of negligence. There is an allegation, however, that "the defendant appropriated the said case of goods to its own use and benefit in disregard of the said agreement," but there is no proof to sustain this allegation, because mere proof of non-delivery, without proof of a wrongful disposition or withholding, is not sufficient to establish a conversion by a carrier. (*Magnin v. Dinmore*, 70 N. Y. 410.) Moreover, upon the defendant's request, the court charged the jury "that if the plaintiff has failed to prove his cause of action as alleged, \* \* \* to wit, the making of a contract with the defendant or its agents at Chicago their verdict should be for the defendant." Tested by this charge, it is manifest the verdict cannot stand because there is no evidence in the record to support it. Nor do I think we should overlook the total failure to prove the cause of action alleged, which is more than a mere variance or defect. To guard against surprise the defendant moved for a bill of particulars, which was ordered, and by which the plaintiff limited himself to proof of an express contract made at Chicago as the basis of his cause of action. The defendant denied the making of such contract and was only required to meet, upon the trial, the issue thus tendered, and yet it now finds itself with a judgment against it based upon its common-law liability as a forwarder implied from the delivery to it of the goods by a connecting carrier, and established upon the trial by evidence tending to prove that the goods were at some time in its possession. Nor is the appellant's contention based upon a technicality, because to ignore it requires us to disregard the office of both the complaint and the bill of particulars. It is now too late for the respondent to contend that the appellant was not prejudiced. Had he moved for an amendment when apprised of the fatal defect in the proof, the question would have been presented to the trial court whether an amendment

would prejudice the rights of the defendant, and upon what terms it could be granted in justice to both parties; but while pleadings are liberally construed and immaterial variances or defects disregarded, and in a proper case the pleadings amended to conform to the proof, when timely objection is made at the trial, a judgment cannot be sustained on appeal if the cause of action alleged is unproved in its entire scope and meaning. (Code Civ. Proc. § 541; *Southwick v. First National Bank of Memphis*, 84 N. Y. 420.)

An appeal from an order denying a motion for a new trial on the ground of newly-discovered evidence was argued with the appeal from the judgment, and while we cannot and, of course, do not consider the papers used on such motion in determining this appeal, I refer to such motion here because it furnishes an apt illustration of the wisdom of the rule which requires the complaint to contain a clear, concise and unequivocal statement of the facts constituting each cause of action, thereby preventing its use as a means of concealment and deception. Upon the motion the defendant produced the affidavits of the agents of the Pennsylvania railroad at Chicago and at Jersey City, and of the New York, New Haven and Hartford railroad at New York, attached to which affidavits are copies of the original shipping receipt made on receipt of the goods at the Star Union Line in Chicago, and of the waybills made at different stages of the route between Chicago and New London, from which it appears that the only shipment of goods in any manner corresponding to the shipment claimed to have been made by the plaintiff was a shipment of eight parcels, corresponding exactly to the eight parcels or packages received by the defendant and delivered by it to the plaintiff, and not including the case claimed by the plaintiff to have been lost. It is difficult to suppose that the plaintiff was ignorant of the fact that the defendant's liability, if liability there was, rested solely upon its obligation as a forwarder by reason of the delivery to it of the goods at New London by the connecting carrier. Had not the defendant been led to suppose that it could successfully defend by meeting the issue tendered, and had the complaint contained a plain, concise and unequivocal statement of the facts upon which the plaintiff actually relied, in the exercise of due diligence the defendant should have discovered and produced this proof upon the trial, which, if believed by the jury,



App. Div.]

Second Department, March, 1906.

would, to say the least, have cast grave suspicion upon the honesty of the plaintiff's claim. Having prepared to meet the issue tendered by the pleadings, a defendant should not be put to the necessity of moving for a new trial on newly-discovered evidence to meet an issue not tendered, and for this reason we have considered the appeal from the judgment rather than the appeal from the order denying the motion for a new trial on the ground of newly-discovered evidence.

The judgment and order should be reversed and a new trial granted, costs to abide the event.

JENKS, HOOKER, GAYNOR and RICH, JJ., concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

---

THE PEOPLE OF THE STATE OF NEW YORK ex rel. LOREN J. WALTERS,  
Relator, v. EDSON LEWIS, as Police Commissioner of the City of  
Mount Vernon, New York, Respondent.

Second Department, March 9, 1906.

**Certiorari to review dismissal of police officer — dismissal upheld —  
evidence — when cross-examination as to past record is admissible.**

When, on certiorari to review the proceedings of a police commissioner in discharging the relator from the police force, it appears that the relator's only excuse for failing to report to the station house by telephone, as required by the rules, and for returning drunk the following morning was that he drank whisky to relieve an alleged interstitial nephritis, the proven neglect of duty warrants the dismissal.

It is not reversible error to compel such police officer to testify on cross-examination that he had been tried several times and found guilty on similar charges. And whether error or no, when the police commissioner certifies that the relator's discharge was based on his last dereliction, and not on his past record, his determination will be upheld.

*It seems*, that the strictest technicalities of evidence are not to be required at administrative trials when the presiding officer is not a common law lawyer or judge.

HOOKER, J., dissented, with opinion.

CERTIORARI issued out of the Supreme Court and attested on the 15th day of September, 1904, directed to Edson Lewis, command-

ing him, as police commissioner of the city of Mount Vernon, to certify and return to the office of the clerk of the county of Westchester all and singular his proceedings had in relation to the removal of the relator from the police force of the city of Mount Vernon.

*Sydney A. Syme*, for the relator.

*Isaac N. Mills*, for the respondent.

GAYNOR, J.:

The evidence against the petitioner that he neglected during the night to report by telephone to the station house from the places established on his beat for that purpose was not disputed, and that he returned to the station house drunk the next morning is scarcely questioned. His dismissal was, therefore, an act of duty, unless his excuse was a good one, for such men have no business on a police force.

The testimony of the petitioner is that he had been afflicted for two years or more with interstitial nephritis, and its accompanying heart pains, and that he had frequent recurring attacks thereof, thirty in two years, more than one a month; that he had three attacks of heart pain during this night, the first at about eleven o'clock; that he got some whisky in a bottle and drank it at intervals on his beat, and remembered nothing thereafter, and was unable to give any account of himself, except that he barely remembered his return to the station house in the morning.

His own evidence established the case of neglect charged against him, for if he was taken sick it was his duty to report the fact by telephone or in person, or in some way, so that his beat might be covered. His neglect to do this was a neglect to cover his beat and report at intervals as required. There was, therefore, no question that the charge against him was established, and that does away with all technicalities of evidence.

But his excuse was plainly without foundation. Though he claimed to have suffered from chronic nephritis and its pains for more than two years, he never reported the fact to the police surgeon, as was his duty. He had been on the force about two years and eight months, and when he was appointed he was carefully examined and found to have no disease.

App. Div.]

Second Department, March, 1906.

All that is claimed is that his dismissal must be reversed on the technical ground that on his cross-examination he was required to testify to having been several times tried on similar charges of neglect of duty, viz., absence without leave five times and intoxication while on duty once, and found guilty of them and fined.

This seems not to have been error according to strict common-law rules of evidence. That he had committed six derelictions similar to that he was being tried for in the short period of his police service was competent on his cross-examination on the question of the probable credibility of his excuse in the present case. That rule is applied even on trials for crime (*People v. Casey*, 72 N. Y. 393; *People v. Noelke*, 94 id. 137; *People v. Irving*, 95 id. 541; *People v. Giblin*, 115 id. 199; *People v. Webster*, 139 id. 73) as well as in a case like this (*People v. Reavey*, 38 Hun, 424; *People v. Dorothy*, 156 N. Y. 237; *Shepard v. Parker*, 36 id. 517).

But even if this were not so, the police commissioner had the right to examine his whole record as a policeman to determine what punishment to impose on him, and whether he did that during the trial or after retiring from the bench, or had it all in mind from personal experience or previous examination, does not matter. Although a police commissioner of a small city like this may be presumed to know the record of all of his men, he is not thereby disqualified from trying them. Indeed, that fact better qualifies him to try them. It will not do for the courts to be so technical and finical in such matters. They have already gone far in that respect, according to just intelligent opinion. No one can delude himself with the notion that a police commissioner fit to hold his place will try a policeman without referring to his record and knowing the sort of man he is. To hold that the commissioner may read the policeman's record, but that if he has it put before him on the trial his judgment will be reversed, would, it seems to me, be absurd. In the case of *People ex rel. Clarke v. Roosevelt* (168 N. Y. 488) the conviction was upheld although the commissioners examined the policeman's record before finding him guilty; and that is all that was done in this case, turn it how you will.

The presumption is that the commissioner did his duty, and found the petitioner guilty on the evidence of his present dereliction and not on his past record. Indeed, he so certifies, not very aptly, it is

true, but unmistakably after all, certainly as plainly as in the *Clarke* case, and it would be altogether too critical to interpret his certificate to the contrary. The technical common-law rules of evidence which are applicable to jury trials, and some of which many think might well be relaxed or done away with even in jury trials after the manner of such trials in England, do not apply to administrative trials like this. Police commissioners are not technical common-law lawyers or judges.

The question for this court is whether there is sufficient evidence that the petitioner neglected his duty as charged. If there is, then the presumption is that he was found guilty on that evidence, and not because of past offenses. Any other rule would lead to undue interference and disorder.

The judgment of the commissioner should be upheld.

HIRSCHBERG, P. J., WOODWARD and JENKS, JJ., concurred ;  
HOOKER, J., read for reversal.

HOOKER, J. (dissenting) :

The relator was charged with willful disobedience of orders in failing to make telephonic reports to the station house from his beats. The evidence upon the merits was conflicting and the question close, and it is apparent that a slight variance in favor of the relator might have turned the judgment the other way.

On cross-examination the relator was asked : "Q. How many times from the time you first came on the force down to the present time have you been charged with violation of the rules and either admitted your guilt and been found guilty or punished ? Mr. Syme : I object to any examination on that line upon the ground that it is incompetent and an indirect manner of proving the conviction upon another charge, which is not admissible for the purpose of this trial. Mr. Bell : These questions are all proper for the purpose of testing the witness's credibility. The Commissioner : I shall rule against Mr. Syme. Mr. Syme : Exception. \* \* \* Q. Is it not true that on December 26, 1901, you were charged with absence without leave and fined two days' pay ? Mr. Syme : I object to the form of the question upon the same grounds as formerly. The Commissioner : I shall rule in favor of Mr. Bell. Mr. Syme : Exception. Q. Is that true ? A. Yes, sir." Over

App. Div.]

Second Department, March, 1906.

similar objection the prosecuting attorney was allowed to ask and the relator answered that he was convicted on April 26, 1902, June 5, 1902, December 4, 1903, and December 18, 1903, and stated the punishment he received upon each conviction.

It is the established law that "In determining the guilt of a police officer, who is on trial for charges preferred against him, the police commissioners cannot act upon their own knowledge. The charges must be tried upon evidence and the guilt must be established by evidence produced before the commissioners upon the trial. \* \* \* But in inflicting the punishment they may take into consideration the evidence, as well as their own knowledge of the police officer, and inflict such punishment, authorized by the rules and the statutes, as in their judgment the case, in view of all the circumstances, requires." (*People ex rel. McAleer v. French*, 119 N. Y. 502, 507; *People ex rel. Clarke v. Roosevelt*, 168 id. 488, 489.)

From the record now under review it is apparent that the police commissioner considered the evidence of the relator's prior convictions in determining the question of his guilt under the charges he was then trying. His return states that "Appended hereto and marked Exhibit 'A' is the record of all the proceedings had upon the charge preferred against Loren J. Walters on the 26th day of February, 1904, for disobedience of orders in failing to report from certain telephone boxes and all testimony taken upon the trial of the said Loren J. Walters, all statements made upon said trial, together with all objections, specifications, proceedings, exceptions, charges, judgments, orders and convictions touching upon said matter." The proceedings which have been quoted, showing the relator's testimony on his cross-examination in respect to prior convictions, included what was so "appended" to the return of the respondent. The 2d paragraph of the return states: "I certify that so much of said evidence as was offered and received in support of the charge preferred was considered by me in determining the question of guilt of said Loren J. Walters upon said charge, and that so much of said record as was not so received was exclusively considered by me in determining the question of the punishment to be inflicted upon him upon his conviction." It is apparent, therefore, that all of the evidence *received* upon the trial before the commissioner was considered by him in determining the question of

Walters' guilt. Evidence of his prior convictions was *received*, and hence that must have been considered by the commissioner in determining this question of guilt. The return itself shows that some matters were exclusively considered in determining the question of punishment, but according to the return itself only that part of the record that was not received in evidence was so considered. It affirmatively appears, therefore, from the return of the police commissioner itself that he considered the record of former convictions upon the question of guilt, and this he should not have done under the authorities cited.

The determination of the commissioner should be annulled, with costs.

Determination confirmed, with costs.

---

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. THOMAS McDERMOTT, Appellant, Impleaded with Others.

Second Department, March 9, 1906.

**Crime — playing "craps" in vacant lot without breach of the peace is not criminal.**

The throwing of dice for certain numbers, called "craps," is not in itself a crime, and when done by a boy and his companions in a vacant lot without noise or disturbance constituting a breach of the peace, is not a violation of section 675 of the Penal Code.

APPEAL by the defendant, Thomas McDermott, from a judgment of conviction rendered in the Children's Part of the Court of Special Sessions of the city of New York on the 9th day of February, 1905.

*William F. Timm*, for the appellant.

GAYNOR, J. :

The charge against the defendant, a twelve-year-old boy, was a violation of that provision of section 675 of the Penal Code that "A person who willfully and wrongfully commits any act which \* \* \* seriously disturbs or endangers the public peace \* \* \*

App. Div.]

Second Department, March, 1906.

for which no other punishment is expressly prescribed by this Code is guilty of a misdemeanor," and the sworn information against him was that he did thus willfully and wrongfully interfere with and disturb the public peace "in that (he) did engage in playing a gambling game, to wit, a game of craps" with other boys in a vacant lot.

The throwing of dice for certain numbers is, it seems, called "craps" by the boys and the police. Some little boys were throwing dice in this way on the ground in a vacant lot. About seven in all were present. There was no noise or disturbance whatever. A policeman came up and seized the defendant. The decided weight of evidence is that the defendant was not playing craps but looking on, or amusing himself near by, and a finding to the contrary should not be sustained.

But there is no statute making the playing of craps a crime any more than playing marbles, and for that reason the charge made against this boy was that he committed the grave and special crime of breach of the peace defined in section 675 of the Penal Code, in that he played craps in a lot. That crime is a substantial and not an imaginary one; proof that the defendant willfully and wrongfully committed an act which seriously disturbed or endangered the public peace, as the statute says, was necessary in order to make it out. It might just as well have been charged that the mere act of playing marbles in the street or in a lot is a breach of the peace. There was no disturbance or danger to the peace proved or even claimed on the trial; the mere act of playing craps by a few of the seven boys was all that was proved. The justice simply took the law into his own hands and convicted the defendant of playing craps, as though that in itself was a crime. He apparently wanted to be better than the law.

This little boy was tried in the Children's Court, which was created to protect and save children. The justice used language toward him which was well calculated to make a reckless and bad boy of him if he had been capable of understanding it, and which must have sounded vulgar enough in that court, viz., that "this fellow here ought to be watching for Canfield" (the keeper of a notorious gambling house), and "he would be all right in the Tenderloin" (an immoral section of the city). He betrayed not the slightest sense of the humane and beneficent office of the Children's Court. He

found the defendant guilty and, incredible as it may seem, sentenced him to fifty days' imprisonment or to pay a fine of fifty dollars, as though he were a mature and dangerous criminal, instead of a little boy who plays marbles and craps and spins tops and flies kites in the streets and vacant lots because he has no other place to play.

The judgment should be reversed.

JENKS, J., concurred; HIRSCHBERG, P. J., WOODWARD and HOOKER, JJ., concurred in the result.

Judgment of conviction reversed, fine ordered to be refunded and the appellant discharged.

WILLIAM C. RUSSELL, Respondent, v. STEPHEN BARRON, Appellant.

Second Department, March 9, 1906.

**Slander — words charging one with exacting commissions — complaint — meaning of words dependent on extrinsic facts must be alleged.**

Spoken words which charge an employee with demanding a commission of others on hiring them for his employer do not charge a crime and are not slanderous *per se*. If they have a slanderous meaning dependent upon extrinsic facts, such meaning must be alleged or the complaint fails to state a cause of action. When words may be slanderous or innocent, dependent upon extrinsic facts, they will be given an innocent interpretation as a matter of law, if no question for the jury is raised by proper allegation as aforesaid.

APPEAL by the defendant, Stephen Barron, from an order of the Dutchess County Court, entered in the office of the clerk of the county of Dutchess on the 1st day of May, 1905, granting the plaintiff's motion for a new trial of the action.

*Joseph Morschauser* [*Charles Morschauser* with him on the brief], for the appellant.

*Frank G. Rikert* [*Elijah T. Russell* with him on the brief], for the respondent.

GAYNOR, J.:

The action is for damages for slander. The complaint does not state a cause of action. The words alleged are that the plaintiff, in employing men for his employer, charged them a commission or fee



App. Div.]

Second Department, March, 1906.

on their wages. To do this is not a criminal offense, and, therefore, the words are not defamatory in that sense. It is said, however, that they impute to him dishonesty to his employer, and, therefore, touch him in his position of employment, which is a separate head of slander. But the complaint does not allege such a meaning, and where the words are equivocal, *i. e.*, capable of an honest or a dishonest, *i. e.*, a slanderous or an innocent, meaning, dependent on extrinsic facts, the complaint must allege the latter meaning in order to state a cause of action (*Taylor v. Wallace*, 31 Misc. Rep. 393). Such an allegation makes the meaning a question of fact for the jury. It is common for employees to take commissions or tips from those dealing with their employers through them, with the knowledge and consent of such employers. Or the reduction in the present case may have been for the employer. The complaint here presents no question of fact for the jury as to the meaning of the words, and therefore the innocent meaning must be taken as matter of law.

But as this point was not raised below, it is not available here to reverse the order granting a new trial, and it can be cured by an amendment.

The order is affirmed.

JENKS, HOOKER, RICH and MILLER, JJ., concurred.

Order of the County Court of Dutchess county affirmed, with costs.

---

JOHN FINAN, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Second Department, March 9, 1906.

**Evidence — when written statement of defendant's witness inadmissible — counsel not entitled to read such statement to witness — power of trial judge — negligence — injury while alighting from train.**

The plaintiff was injured by the sudden starting of a train from which he was alighting. In an action to recover damages for said injury,

**Held**, that it was not error to exclude the written statement of defendant's employee as to what he saw of the accident when permission was given to the witness to refresh his recollection therefrom if necessary.

Nor was it error to prohibit defendant's counsel from reading such statement to the witness.

Control of trial judge over the course of trial stated.

Order granting extra allowance reversed.

APPEAL by the defendant, The New York Central and Hudson River Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Dutchess on the 16th day of December, 1904, upon the verdict of a jury for \$10,000, and also from two orders entered in said clerk's office on the 16th day of December, 1904, respectively denying the defendant's motion for a new trial made upon the minutes and granting the plaintiff's motion for an extra allowance.

The action was for damages for personal injuries. The plaintiff claimed that the defendant's train stopped to let passengers off, and then started up violently while he was on the steps in the act of getting off, and threw him off.

*Robert Wilkinson*, for the appellant.

*Charles Morschauer* [*Harry Arnold* with him on the brief], for the respondent.

GAYNOR, J. :

The chief grievance of the appellant lies in the assertion of its counsel in a separate point in his brief, "That the trial was so conducted as not to give the appellant a full and fair trial." And this is elaborated as follows: "The court repeatedly, by comment and interjections, construes the evidence, modifies its meaning, tries the plaintiff's case, keeps out dangerous evidence, hampers the defense and shows the jury plainly the Court's view of the verdict to be rendered."

The main fault the learned counsel finds with the trial judge is with his rulings and admonitions in respect of an attempt of said counsel to get before the jury the contents of a written statement of an employee of the defendant of what he saw of the accident. It occurred while such employee was being examined as a witness for the defendant, the written statement having been made by him to the defendant a few days after the accident. The learned trial judge excluded it, but said the witness might resort to it to refresh

his recollection if he needed to. This did not suit the learned counsel. "That, your honor," said he, "is not what I ask. I ask leave to prove that this statement was then correct, and then to offer it in evidence." He then not only excepted to the ruling excluding it, but began reading parts of the statement to the witness to get the contents before the jury in spite of the court's ruling. The learned trial judge was in duty bound to protect the other side from such unfairness, and did so with a forbearance which the law did not exact of him. That he finally said to counsel for the defendant; "This cannot go on any further," and "You cannot read all that statement here," which are the things complained of, was entirely proper; indeed, he might have fallen short of his duty by saying less, and would not have exceeded it by saying more. He did not prevent counsel from having the witness read all of the statement, or any part of it, to refresh his recollection. If that had been done, and the witness still could not recollect, a question of admitting the paper or some part of it in evidence might have arisen. But no such question was presented. Counsel insisted on reading the statement himself to the witness.

The four other remarks of the learned trial judge which are criticised as unfair are not in the least so. The plaintiff instead of the defendant might consider at least two of them as not favorable to him, especially if he entertained an arrogant or belittling notion of the functions of a trial judge.

The appellant's fault-finding with the trial judge seems to be based on the notion that trial judges in this State are reduced to the humiliating position of having no right to say or do anything in a jury trial except to formally rule in monosyllables on questions presented by counsel; that they may do nothing to guide and control the course of the trial, or to restrain counsel and keep them within bounds and to the point, or even from taking an unfair advantage by prejudicing the jury by false suggestions, and the like. Horne Tooke told Lord KENYON, before whom he was being sued, that his lordship's only business was to help the tipstiffs keep order while the jury and counsel tried the case. But that extraordinary personage said it in good humor and altogether reprovingly, and to illustrate the independence of juries on questions of fact, and it was taken in that sense; while the serious and growing disposition of some in

this State seems of late to be to actually reduce a trial judge to that position in the trial of civil causes, and leave counsel to do as they please. It would not be well for the administration of justice in this State if that purpose should prevail. When trial by judge and jury is reduced to trial by jury only, the uncertainties in the administration of justice will be increased tenfold. Trial judges in this State are under the law a light and a guide to juries. They may often appropriately even express their opinion on the facts to the jury in civil causes, provided they fairly leave the decision of the questions of fact to the jury, and frequently do so (*Massoth v. D. & H. C. Co.*, 64 N. Y. 534). And juries are not so slavish to the court as seems to be taken for granted in some quarters.

The order granting an extra allowance must be reversed. The case was not a "difficult and extraordinary" one (*Standard Trust Co. v. N. Y. C. & H. R. R. Co.*, 178 N. Y. 407), but a common-place negligence case. I am not able to agree to the proposition, however, that a trial judge lacks power to grant an extra allowance in negligence cases. Some of them are the most difficult and extraordinary that are tried.

The judgment, and the order denying a new trial, are affirmed; the order granting an extra allowance is reversed.

HIRSCHBERG, P. J., WOODWARD, RICH and MILLER, JJ., concurred in result.

Judgment and order denying motion for new trial unanimously affirmed, with costs. Order granting extra allowance reversed.

---

LOTTIE GAINES, Appellant, v. THE FIDELITY AND CASUALTY  
COMPANY OF NEW YORK, Respondent.

Second Department, March 9, 1906.

**Accident insurance—failure of beneficiary to show that she was wife of insured as warranted by him—when death of insured by shooting is not accidental.**

A policy of accident insurance is void if the warranty made by the insured that the beneficiary was his wife was false.

A verdict that the beneficiary was not the wife of the insured is warranted by the evidence when it is shown that the woman was married to another man.

App. Div.]

Second Department, March, 1906.

who is still living, and from whom she was never divorced, and there is no proof that he ever absented himself, or that the wife ever made any effort to find out whether he was alive or dead, and there is no evidence of a marriage *in praesenti* with the insured, but the evidence shows merely an agreement to live together as man and wife and the entry into illicit relations, and when in addition there is testimony given by the plaintiff on a former trial of the action that she had been married but once, and it appears that she brought an action against the estate of the insured for services rendered as his housekeeper.

When the policy of insurance covers only accidental death and expressly excepts death from injuries intentionally inflicted, a verdict for the defendant is warranted by evidence which shows that the man who shot and killed the insured did so intentionally in self-protection against an attack by the insured. Testimony establishing that the shooting was intentional considered.

APPEAL by the plaintiff, Lottie Gaines, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 2d day of December, 1904, upon the verdict of a jury, also from an order entered in said clerk's office on the 28th day of October, 1904, denying the plaintiff's motion for a new trial made upon the minutes, and also from an order entered in said clerk's office on the 28th day of October, 1904, denying the plaintiff's motion for a new trial made on the ground of newly-discovered evidence.

*Alfred C. Cowan*, for the appellant.

*Charles C. Nadal* [*William D. Stiger* with him on the brief], for the respondent.

HIRSCHBERG, P. J.:

I think the verdict of the jury in favor of the defendant is sufficiently supported by the evidence with respect to each of the three points submitted, viz., whether the plaintiff was the wife of the deceased at the time the insurance was effected; whether the injuries resulting in the death of the deceased were intentionally inflicted, and whether the death of the deceased resulted from fighting.

The policy is one of accident insurance, payable to the plaintiff, who was warranted by the deceased to be his wife. The case was before this court on appeal from a judgment and order rendered on a former trial, and it was then held that the warranty that

the beneficiary was the wife of the insured would, if false, render the policy void. (See *Gaines v. Fidelity & Casualty Co.*, 93 App. Div. 524.) That case was followed by this court in *Makel v. Hancock Mutual Life Ins. Co.* (95 App. Div. 241). In the opinion delivered on the first appeal (93 App. Div. 524), while it was stated that the court should have dismissed the complaint for the breach of warranty, it was also stated that the evidence on the other two questions was sufficient to have supported a verdict in favor of the plaintiff. I think that the evidence on these two questions, as presented in the present record, is stronger in favor of the defendant than it was on the first trial.

The question of the relation existing between the plaintiff and the deceased requires no extended discussion. It was undisputed that the plaintiff had been married to one Tazewell many years before the insurance was taken out and that no divorce had ever been granted. The plaintiff's husband was a witness on the trial. There was no proof that he ever absented himself or that the plaintiff had ever made an effort to find out whether he was alive or dead, or that she had any reason to think that he was dead, or that she did so think at the time she commenced to live with the deceased. There is no evidence of an agreement between the plaintiff and the deceased *in presenti* to assume marital relations. The evidence is confined to an agreement between the parties to live together as man and wife, followed by an entry into illicit relations. Moreover, it appeared that on the first trial the plaintiff testified that she had never married but once and that on that occasion she was married to Tazewell; and it further appeared that after the death of the deceased she brought an action against his personal representative to recover money for services rendered by her as housekeeper for the insured during the period or a part of the period covered by their illicit relations.

The deceased was shot and instantly killed by a man named Connors. Connors testified at the trial, and his evidence was clearly to the effect that he received a blow from the deceased, whom he recognized, and that the shooting was in response to it. He was asked and answered as follows: "Q. Did anybody strike you but Gaines? A. He was the only man who struck me. \* \* \* Q. In shooting, what were you shooting at? A. I was shooting at the

App. Div.]

Second Department, March, 1906.

object with the hand up which said, 'You son of a bitch, I'll kill you,' and kept shooting. There were only two persons there, Mrs. Jackson and him. Q. Mrs. Jackson did not try to do you any harm, did she? A. No, she did not hit me. Q. There was nobody else in the place that you saw, was there? A. Nobody else there. \* \* \* Q. How far was he from you at that time? A. He was about four or five feet, something like that, very close. Q. When you drew your pistol did you shoot in his direction, or point in his direction? A. Shot in his direction, yes, sir. Q. Whom did you intend to shoot? A. Well, I heard him say, 'You son of a bitch, I'll kill you.' When he used those words 'You son of a bitch, I'll kill you,' I wanted to protect my own life, scare him or something. Q. Whom did you intend to shoot? A. I was shooting directly towards him. Q. Mrs. Jackson had not done you any harm? A. No. Q. She had not threatened you? A. No. Q. *Then the one you intended to shoot was the man who threatened you?* A. *Yes sir. Q. And that was Gaines. A. Yes, sir.*"

The testimony quoted is quite sufficient to justify the conclusion that the deceased came to his death as the result of an assault committed by him upon the person of Connors, and that the shooting which followed it was the direct result of the assault, and that the injuries inflicted upon the deceased and which caused his death were intentional and not accidental. These facts, by the express terms of the policy, deprived the beneficiary of any right to recover upon the contract.

I do not find anything in the alleged newly-discovered evidence which either requires or justifies the granting of a new trial.

The judgment and orders should be affirmed.

WOODWARD, JENKS, RICH and MILLER, JJ., concurred.

Judgment and orders affirmed, with costs.

ROBERT WENDIN, Appellant, v. BROOKLYN HEIGHTS RAILROAD  
COMPANY, Respondent.

Second Department, March 9, 1906.

**Municipal Court of New York — order opening default not reviewable on  
appeal from judgment which has been vacated.**

As section 257 of the Municipal Court Act of the city of New York prohibits an appeal from an order opening a default and vacating a judgment entered thereon, a plaintiff who has obtained a judgment by default, which has been opened and the judgment vacated, cannot review said order under the guise of an appeal from the judgment in his favor.

APPEAL by the plaintiff, Robert Wendin, from a judgment of the Municipal Court of the city of New York, borough of Brooklyn, in favor of the plaintiff, entered in the office of the clerk of said court on the 20th day of January, 1905, the plaintiff appealing for the purpose of procuring a review of an order opening a default.

*Charles A. Rathkopf*, for the appellant.

*A. M. Williams*, for the respondent.

WOODWARD, J.:

This action was brought for the purpose of recovering damages for personal injuries resulting from an assault committed upon the plaintiff by one of defendant's servants while plaintiff was a passenger in one of defendant's cars. The action resulted in a judgment in favor of the plaintiff for \$100. Subsequently the defendant moved the court to open the judgment, which was taken by default after numerous adjournments, and the motion made before the learned justice who tried the action was denied, with five dollars costs. Later the defendant made a motion before another justice of the Municipal Court, asking to have the default opened, and this motion was granted on condition that the defendant pay the plaintiff ten dollars costs, which appears to have been done, although in an irregular manner. The plaintiff, who has no grievance so far as the judgment is concerned, appeals from the judgment in an effort to get a review of this order opening the default; and while we



App. Div.]

Second Department, March, 1906.

have no doubt under the facts stated that he would be entitled to a reversal of the order if the same was before the court, we are of opinion that he cannot appeal from a judgment with which he is satisfied for the purpose of gaining relief from the order; that he cannot give this court jurisdiction in this way. Section 257 of the Municipal Court Act (Laws of 1902, chap. 580) provides that "an appeal shall lie from an order granting or denying a motion, made as provided in the last four sections, as from a judgment, except that no appeal shall lie in the first instance from an order opening a default and vacating a judgment entered thereon." It was evidently the purpose of this section not to permit an appeal from an order vacating a judgment, but to compel the parties to retry the action and review all of the questions upon an appeal from the final judgment if it resulted adversely to the party whose judgment had been vacated. As the plaintiff's case now stands there is no judgment for him to appeal from; the default has been opened and the judgment set aside. Until the judgment, or some judgment, in the case has been entered, there is no foundation for an appeal from the judgment, and as the order cannot be reviewed in the first instance, the original judgment cannot be reinstated. This does not seem to reach the justice of this particular case, but we have no power to change the law governing the jurisdiction of this court in reviewing judgments of the Municipal Court, and there seems no other way than to dismiss this appeal, but it should be without costs.

Appeal dismissed, without costs.

HIRSCHBERG, P. J., GAYNOR, RICH and MILLER, JJ., concurred.

Appeal dismissed, without costs.

WILLIAM G. BEECROFT and EDGAR C. BEECROFT, as Executors, etc.,  
of JOHN R. BEECROFT, Deceased, Respondents, v. THE NEW YORK  
ATHLETIC CLUB OF THE CITY OF NEW YORK, Appellant.

Second Department, March 9, 1906.

**Negligence — membership corporation liable for personal injuries received through negligence of its servants — evidence — statement of member of such corporation to accident insurance company that he was being carried home not conclusive.**

A membership corporation organized as an athletic club, sustained by membership dues and maintaining a clubhouse, is liable for injuries resulting in the death of a member received by the negligent act of the driver of a wagon used by said club for conveying members to the clubhouse.

The fact that the decedent, after the injury, in complying with the conditions of certain accident insurance policies, stated that his injuries were received while being carried to his home, does not prevent a recovery against said club when there is evidence that in fact he was being driven to the club in the club conveyance in order to keep an engagement with a friend.

APPEAL by the defendant, The New York Athletic Club of the City of New York, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Westchester on the 6th day of March, 1905, upon the verdict of a jury for \$9,500, and also from an order entered in said clerk's office on the 27th day of March, 1905, denying the defendant's motion for a new trial made upon the minutes.

*Isaac N. Mills* [*John C. Gulick* with him on the brief], for the appellant.

*William S. Cogswell* [*Edgar C. Beecroft* with him on the brief], for the respondents.

WOODWARD, J. :

The defendant maintains a clubhouse on Travers Island. Plaintiffs' testator was a member of the defendant, and was injured while being carried in one of the defendant's wagons from the railroad station at Pelham Manor, Westchester county, to defendant's clubhouse on the island. Upon the trial of the action there was evidence which warranted the jury in finding that plaintiffs' testator had made arrangements to meet one Hunter at the clubhouse that evening on the arrival of the train at about six o'clock;

App. Div.]

Second Department, March, 1906.

that plaintiffs' testator arrived on such train; that the defendant's wagon was there in charge of one of its servants, and that the deceased entered the wagon, after dismissing his own conveyance which had met the train, and was being driven to the clubhouse when the driver negligently drove the wagon against an obstruction, throwing the decedent to the ground, producing injuries from which he subsequently died. The jury returned a verdict in favor of the plaintiffs for the sum of \$9,500, and this was increased, over the objection and exception of the defendant, by an extra allowance of five per cent. The defendant appeals from the judgment and from the order denying a motion for a new trial upon the minutes.

It is urged upon this appeal that the defendant corporation is not such a corporation as to be liable to its members for negligence, and counsel frankly admits that he has been unable to find any authority upon this direct point, but urges it as a reason for reversal. We are of opinion that there is no ground for this contention, an athletic association, conducting clubhouses, and sustained by membership dues, not being within the reason of the rule which limits the liabilities of hospitals and other organizations organized for the purpose of performing a service which belongs to the public. It hardly seems worth while to seriously consider this question in the absence of some principle which might properly relieve the defendant of its obligations to those whom it has injured through its negligence.

It was shown upon the trial that the plaintiffs' testator had, for the purpose of complying with the conditions of certain accident insurance policies, submitted affidavits in which it was stated that his injuries had been received while being carried to his home, and it is urged upon this appeal that these statements should have been accepted as conclusive, and that, as the deceased was not being carried to the clubhouse, the defendant owed him no duty. There was evidence going to show that the deceased was, in fact, being carried to the clubhouse, and the court charged that if this was not the case the plaintiffs had no right to recover, and the jury having found in favor of the contention of the plaintiffs, we see no reason for disturbing the verdict. The decedent, as a member of the club, had a right, no doubt, to make use of the club wagon to be carried from the train even to his own residence, if that was along the way, as it appears to have been, and he was entitled to reasonable care.

But the evidence was such as to warrant the jury in finding, within the limits of the charge, that decedent was actually on his way to the club, and under such circumstances he certainly had a right to the exercise of reasonable care on the part of the defendant and its servants. The mere fact that the decedent may have made a general statement, in complying with a requirement of his accident policies, that he was injured on his way home from the station, was not inconsistent with the theory on which the case was submitted to the jury, that he was on his way to the club. He was, generally speaking, going to his home; he merely intended stopping at the club to meet a friend and was then to go to his home for dinner. The requirement of the accident policy was a statement showing the circumstances of the accident, and the question of whether the decedent was going to his home or to the club was of no material importance there, however important it might be in an action for negligence against the defendant, and it would be very remarkable if an incidental statement of this character should be allowed to control the positive evidence in support of the plaintiff's theory of the accident and of the defendant's liability.

In view of the conclusion which we have reached upon the point last above considered, the alleged error of the court in its charge to the jury is without force, and after an examination of the other errors alleged we are of opinion that the case was properly submitted to the jury upon a charge which was as favorable to the defendant as it had any right to expect, and that the verdict should not be disturbed.

We are equally clear, however, that this was not such a difficult and extraordinary case as to justify an extra allowance. It was merely a negligence case, depending upon no special features.

The judgment should be modified by striking out the extra allowance, and judgment as modified and order should be affirmed, without costs.

Present — HIRSCHBERG, P. J., WOODWARD, GAYNOR, RICH and MILLER, JJ.

Judgment modified by striking out the provision for extra allowance, and as modified judgment and order unanimously affirmed, without costs.

App. Div.]

Second Department, March, 1906.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WILLIAM E. MELODY, Sheriff of the County of Kings, Relator, v. CUTHBERT W. POUND and Others, Composing the State Civil Service Commission of the State of New York, Respondents.

Second Department, March 2, 1906.

**Certiorari — return conclusive even though error admitted by respondent — further return is proper remedy.**

The return of the State Civil Service Commission on certiorari is conclusive even though the counsel for the respondent admits that it is not in accord with the facts.

The remedy to correct such error is by a further return under section 2135 of the Code of Civil Procedure.

CERTIORARI issued out of the Supreme Court and dated the 4th day of August, 1903, directed to Cuthbert W. Pound and others, composing the State Civil Service Commission of the State of New York, commanding them to certify and return to the office of the clerk of the county of Kings all and singular their proceedings had in relation to the classification in the civil service of certain positions in the office of the sheriff of the county of Kings.

*Charles H. Hyde*, for the relator.

*Julius M. Mayer*, Attorney-General, for the respondents.

JENKS, J. :

This is a writ of certiorari to review the proceedings of the State Civil Service Commission, granted on the petition of the sheriff of Kings county, informing the court that the commission had placed the positions of assistant deputy sheriffs, keepers of jail, van drivers and matrons in the classified or competitive class of the State civil service. The commissioners return that they "deny that they at any time placed the positions involved herein, namely, those of assistant deputy sheriff, keeper of the jail, van driver and matron, in the office of Sheriff of Kings County in the competitive class." Section 2134 of the Code of Civil Procedure prescribes that there must be made "a return, with a transcript annexed, and certified \* \* \*, of the record or proceedings, and a statement of the

other matters, specified in and required by the writ." We cannot look back of such a return into the petition and the accompanying papers. (*People ex rel. Miller v. Wurster*, 149 N. Y. 549.) The learned and able Attorney-General says that the return was made by his predecessor, and in effect (as it seems as matter of fact that the positions are in the competitive class) he must conjecture that the return is based upon one of two technical points, though he ventures no further. We are urged by him to accept his concession that in effect the return is not in accord with the facts. Although his spirit of concession is entirely commendable, yet I think the court should not proceed when it must do so upon the concession that the return is not true in that it is not consistent with matters of fact. I think under the circumstances we should order a further return under the authority of section 2135 of the Code of Civil Procedure as construed in *People ex rel. Press Pub. Co. v. Martin* (142 N. Y. 228), and *People ex rel. Miller v. Wurster (supra)*.

HIRSCHBERG, P. J., HOOKER and MILLER, JJ., concurred.

Further return ordered under authority of section 2135 of the Code of Civil Procedure.

---

JANE TRACEY, Respondent, v. DANIEL REID, Appellant.

Second Department, March 9, 1906.

**Evidence—assault and battery—evidence of what plaintiff's daughter, not present at assault, said to one joint defendant not admissible—hearsay.**

In an action against joint defendants (the vendor of a piano and men hired by him to remove it from vendee's premises) for an assault committed on the vendee in removing the piano, it is reversible error to admit evidence of what the plaintiff's daughter, who was not present at the assault, said regarding the same on the following day to the servant of the vendor of the piano. Such testimony is hearsay as to both defendants.

Such evidence, which substantiated the plaintiff's testimony, cannot be said to have been without influence on the jury.

GAYNOR, J., dissented, with opinion.

APPEAL by the defendant, Daniel Reid, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the

App. Div.]

Second Department, March, 1906.

clerk of the county of Kings on the 15th day of December, 1904, upon the verdict of a jury, and also from an order entered in said clerk's office on the 9th day of January, 1905, denying the defendant's motion for a new trial made upon the minutes.

*Herbert B. Brush* and *George W. McKenzie*, for the appellant.

*Thomas F. Magner*, for the respondent.

MILLER, J.:

The plaintiff has recovered a judgment for personal injuries alleged to have been inflicted upon her in the commission of an assault by one of the appellant's servants. The action was brought against the appellant and one Lyman G. Bloomingdale, and it appeared that the appellant, a piano mover, was employed by the defendant Bloomingdale to move a piano from the premises where the plaintiff lived; that he sent two of his employees to the place for the purpose, and the plaintiff claims that while there one of them assaulted her. She is corroborated as to the assault by a little girl. The two men flatly contradicted her. The learned trial court dismissed the complaint as to the defendant Bloomingdale, and sent the case to the jury as to the appellant upon two questions of fact, viz., whether the assault was committed, and whether the men were acting within the scope of their authority. Our attention is called to an exception which is fatal to the recovery. The plaintiff's daughter, who was not a witness to the transaction, testified that the day following the alleged assault she went to the store of the defendant Bloomingdale and there had a conversation with one of his salesmen. I now quote from the record: "Q. Tell us all that you said to him and all that he said to you? [Objected to as incompetent, no proper foundation having been laid and as not binding on either of the defendants. Objection overruled; exception by defendants.] A. Why, this salesman that we bought the piano from took me into the office. I told him just what happened down there, how they abused my mother. Q. Tell what you said? A. I went in to him and I started and I said, 'Do you send men, when you sell a piano and when people fall in arrears with two or three payments — does a firm like Bloomingdale's send two burly men to lick and abuse a woman and take the piano away from her, when

she had sent a payment the previous week?' He says, 'No, we do not.' He says, 'We have no men in our employ, and if we had we would not keep them that would do such a thing.' \* \* \* Q. I ask you about the conversation that took place between you and this superintendent up in Bloomingdale's store? A. That is all there was. Q. Is that all that you remember of the conversation? A. That is all. Q. Let me see if I can refresh your memory. Did you tell him anything about what happened the day before at your house? [Objected to; objection overruled; exception taken.] A. I did. Q. What did you tell him about what happened at your house the day before? A. I told him they struck my mother in the knee with the door, and they struck her in the chest and knocked her over a chair."

This testimony must all be regarded as in subject to the specific objection that it was not binding on either defendant. (*Sherman v. D., L. & W. R. R. Co.*, 106 N. Y. 542.)

The assertion that the evidence was admitted against one defendant only, is directly opposed to the record, and there is not a suggestion in the record of the theory upon which it was received. We may speculate on what was in the learned trial judge's mind, but such speculation cannot supply an adequate reason for admitting evidence which was the rankest hearsay as to both defendants. The appellant was not required to move to strike out such evidence admitted over his objection, and the only question here is, has the respondent borne the burden of satisfying us that this manifest error was harmless? (*Gearty v. Mayor, etc., of New York*, 183 N. Y. 233.) The objectionable testimony was received under a ruling of the court which in effect instructed the jury that it was proper evidence for them to consider in determining the issues. The plaintiff had to establish her case by preponderating proof. The testimony of herself and the little girl balanced against the testimony of the two men may have left the jury in doubt. How are we to say that the fact, that the plaintiff's daughter immediately after the occurrence went to the people supposed to have been responsible and there made a complaint and related the occurrence exactly as the plaintiff testified to it, did not have the effect of turning the scales in the plaintiff's favor? That this evidence might have prejudiced the appellant is so manifest that I should not dis-



App. Div.]

Second Department, March, 1906.

cuss it were it not for the assertion that we, looking into this record, would not be influenced by it, therefore the jury, who must be credited with like common sense, could not have been. If this is to be the rule for determining whether a mistake in admitting evidence is reversible error, it were better to abolish all rules of evidence. When we ourselves know that it is impossible accurately to gauge the effect of our own conceits and of irrelevant facts upon our own judgment, the absurdity of testing the effect of a given fact upon another mind by the effect which we think it would have upon our own becomes apparent. The test is not, would the evidence have affected us, but might it have affected another? The plaintiff's counsel evidently thought that this testimony would help his case, and not satisfied with one statement of the witness had her repeat her narrative of the alleged assault in substance as the plaintiff herself testified to it. Counsel have not infrequently argued in this court that conceded error in the admission of testimony was harmless in cases in which it was apparent that such testimony was introduced for the sole purpose of improperly influencing the jury by counsel who knew that it was improper. Of course common sense should govern juries, trial judges and appellate courts, but when the trial judge makes such a manifest error in the admission of evidence, must we not disregard our common sense in order to say that the jury may not have made a like error in considering it? Applying the rule of common sense to this question, we all know very well that juries do sometimes give controlling effect to facts and circumstances not regarded by court or counsel as of any moment. The mental processes by which these twelve jurors reached a conclusion are not photographed in this record, and there are no data upon which to base a conclusion as to whether they considered the objectionable testimony. But as a legal proposition the reception of such testimony was error which may have harmed the appellant. Under our system of jurisprudence judicial investigations must be conducted according to settled rules of evidence, and if these rules are violated appellate courts must reverse unless satisfied that the error was harmless. I have no quarrel with this system,<sup>13</sup> but am persuaded that justice is better administered by adhering to settled rules than by brushing them aside upon the theory that our common sense tells us that they are of no moment,

and I, therefore, vote to reverse the judgment and order and to grant a new trial, costs to abide the event.

HIRSCHBERG, P. J., and WOODWARD, J., concurred ; GAYNOR and RICH, JJ., dissented.

GAYNOR, J. (dissenting):

The objection to the evidence was not that it was incompetent against the appellant, but against "either of the defendants," and the exception taken was also joint. Hence, after an every-day rule, the exception is not good if the question was admissible against either defendant. The trial judge seems to have deemed it admissible against defendant Bloomingdale (who was granted a non-suit later on), as tending to get an admission of him against himself concerning the battery, and counsel for the appellant seems to be still of that view. The question was allowed on that theory only, and hence against Bloomingdale only. But this was erroneous, for the conversation being not with Bloomingdale but with his salesman, the question was not competent against him, for such an admission after the fact by an agent is not binding on the principal.

The question having been asked and allowed against the defendant Bloomingdale only, and on the theory that it was competent against him only, the appellant should have moved that it be struck out after the complaint had been dismissed as to Bloomingdale, if he thought it could harm him. Having failed to do so, he should not now be permitted to claim that he was injured by it. It is obvious that he attached no importance to it on the trial, and that no one else did.

But the evidence could not in the minds of sensible men have done the appellant any harm, and we must rate trial judges and jurymen as sensible men, though there may be a tendency to the contrary. It could not even have done Bloomingdale any harm if the case against him had gone to the jury, for no admission against him was obtained, which was the sole object of the evidence. On what foundation then may it be said to have injured the appellant?

And it must be borne in mind that this evidence was not by the plaintiff, but by her daughter, who was not present at the battery. What would we have to think of juries in order to say that this jury may have been influenced in deciding whether there was a

battery by the gab of a person who was not present at the occurrence at all? By declaring such a whimsical opinion of juries, it seems to me that we might provoke a like opinion of ourselves.

It would be very easy for us sitting here to assume a sense of exclusive average intelligence in ourselves, and say that the evidence could not have affected us—quite absurd to suggest it—but that we do not know but that it influenced the jury, and may be the trial judge—which is of course putting them below par in intelligence. I am not willing to join in that. We have already had much of that in this State. Very recently a learned judge voiced his own estimate of juries, if not that of his court, by saying (in a case tried in Kings county and that went up from this court) “we should not be hypercritical in construing it (the charge) simply because a jury has unexpectedly rendered a verdict in favor of a railroad corporation.” How strange this sounds to the bench and bar of this part of the State will be understood when it is stated from the records that here in Kings county such corporations constantly get over sixty-five per cent of the verdicts; and the same is true generally in this judicial department. If there be localities which are afflicted with ignorant or prejudiced verdicts, that is not the fault of the jury system, but of the public officials who summon unfit jurymen and leave the fit men off the panel, and of the local bench and bar which suffer such a wrong to continue.

It is not enough that it was a technical error under the common-law rules of evidence to admit the evidence. Trial judges are to be guided by such rules of evidence, it is true; but that does not mean that they must avoid all error in order to make judgments good; that judgments must be reversed for every error in the admission of evidence. A trial judge is not perfect any more than we or any of the sons of men are. A rule of perfection can no more be applied to the trial of a law suit than to any other human transactions. A rule of common sense is the working rule of this world, and the law never departs from common sense, though it may sometimes be made to seem to do so.

Judgment and order reversed and new trial granted, costs to abide the event.

WILLIAM J. WASHINGTON, Respondent, v. EPISCOPAL CHURCH OF  
ST. PETER'S, Appellant.

Second Department, March 9, 1906.

**Negligence—injury to plaintiff by fall through unguarded elevator shaft on demised premises—failure to show negligence of lessor.**

The plaintiff fell down an unguarded elevator shaft of a building and was injured. At the time the building was in the possession of a tenant and sub-tenant. In an action against the lessor for damages, no proof was given that at the time the lease was made the defect in the elevator shaft existed.

*Held*, that a nonsuit should have been granted, as the defendant did not maintain the elevator and there was no evidence to show a faulty condition of the premises at the time of the lease thereof.

APPEAL by the defendant, the Episcopal Church of St. Peter's, from a judgment of the County Court of Westchester county in favor of the plaintiff, entered in the office of the clerk of the county of Westchester on the 24th day of May, 1905, upon the verdict of a jury for \$900, and also from an order entered in said clerk's office on the 22d day of May, 1905, denying the defendant's motion for a new trial made upon the minutes.

*Stephen O. Lockwood*, for the appellant.

*Ira Leo Bamberger* [*Abraham Oberstein* with him on the brief], for the respondent.

MILLER, J. :

The plaintiff fell through an elevator opening from the basement to the sub-basement of a building owned by the defendant, and brings this action to recover damages for personal injuries, alleging as the basis of negligence or breach of duty on the part of the defendant its failure to provide the gate, or guards and trapdoors required by section 95 of the Building Code of the city of New York. The elevator was used for the hoisting of materials from the basement or sub-basement to the ground floor. Three years before the accident the defendant had leased the portion of the premises including the first floor, basement and sub-basement to a

tenant who, with its sub-tenants, occupied the premises at the time of the accident. The record discloses and the court charged the jury that there was no proof that at the time the premises were demised there was a nuisance on them. The court, nevertheless, charged the jury that if the defendant was receiving the rent of premises which were in an unlawful condition it was liable for any injury resulting therefrom. It is unnecessary to consider the question discussed in the briefs whether proof of the violation of a city ordinance furnishes proof or evidence merely of negligence, although this question seems to be settled adversely to the contention of the respondent (*Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 488) because this judgment must be reversed for the want of any evidence tending to prove any fault or breach of duty on the part of the defendant. The defendant did not maintain this elevator, and in the absence of evidence tending to show a faulty condition upon the demise of the premises, it owed the plaintiff no duty. (*Ahern v. Steele*, 115 N. Y. 203; *Sterger v. Van Sicklen*, 132 id. 499.) We do not understand the respondent to question this rule; instead, he urges that the evidence warranted the conclusion that the premises were demised in a defective condition. This contention cannot prevail in the face of the charge of the trial court to the effect that there was no such proof, and, moreover, we think the trial court was right in this respect, from which it follows that the motion for a nonsuit should have been granted.

The judgment and order should be reversed and a new trial ordered, costs to abide the event.

HIRSCHBERG, P. J., WOODWARD, GAYNOR and RICH, JJ., concurred.

Judgment and order of the County Court of Westchester county reversed and new trial ordered, costs to abide the event.

OTTO KIEFER, Respondent, v. THE BROOKLYN HEIGHTS RAILROAD  
COMPANY, Appellant.

Second Department, March 9, 1906.

**Negligence — passenger thrown from car while riding on platform —  
failure to show negligence of defendant — contributory negligence.**

While it is not contributory negligence *per se* for a passenger to ride on the platform of a crowded surface car, he assumes the ordinary risks incident to such a position. A passenger who is thrown from such position must show, in order to charge the railway company with negligence, that he was thrown by reason of some unusual movement caused by the negligent operation of the car.

Hence, mere testimony that the car while rounding a curve was going "pretty swift \* \* \* about nine miles per hour" is insufficient to make a case, particularly when other persons in the same situation observed nothing unusual.

A passenger in such position, who does nothing to protect himself, or even look to see if there is anything from which he may obtain support, is guilty of contributory negligence.

APPEAL by the defendant, The Brooklyn Heights Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Queens on the 20th day of April, 1905, upon the verdict of a jury for \$300; also from an order entered in said clerk's office on the 13th day of May, 1905, denying the defendant's motion for a new trial made upon the minutes, and also from an order entered in said clerk's office on the 18th day of May, 1905, granting the plaintiff an extra allowance of costs.

*I. R. Oeland* [*George D. Yeomans* with him on the brief], for the appellant.

*Charles H. Kelby* [*Ralph Underhill* with him on the brief], for the respondent.

MILLER, J.:

The plaintiff either fell or was thrown from the rear platform of one of the defendant's cars as it was rounding a curve, and the question presented by this appeal is whether there was sufficient

App. Div.]

Second Department, March, 1906.

evidence of the defendant's negligence and of the plaintiff's freedom from contributory negligence. Plaintiff testified: "As soon as the car went across the track and struck the second curve, it jogged me like that and I was thrown off and I didn't know any more. It was not the ordinary jog of turning that I had experienced before. \* \* \* I knew of this bend in the car tracks crossing Fulton street; I knew there was a bend there. And I knew where I was when the car got there. I knew the car was crossing those tracks. The car stopped just before crossing Fulton street, and then it did not start up with the bell in the usual way to go across, it started off very quick. He put on the power first and then he put on more, and it shot across the track so fast I didn't have time to think where I was, and as soon as he struck the second curve I was thrown. He put it on very quick. I didn't see how much he put on, but I could feel it. I didn't have hold of anything. There wasn't anything to take hold of. \* \* \* I didn't notice a rail there, I had my back turned. I did not look to see whether there was anything to take hold of. \* \* \* I say this car was going fast across those tracks and I knew the bend was there, that that bend would swing the car around when it went around that fast. I didn't have that thought about me. I didn't think much about that. I knew it was there and I did not take hold of anything." One witness for the plaintiff, who observed the movement of the car from the sidewalk, testified that it came around "pretty swift," that it seemed "to be going quick speed. My attention to the accident was first attracted by the car coming around so fast, I said there will be something doing some day these cars going at such a rate." Another witness testified that he observed the car and that it was going at the rate of nine miles an hour.

On behalf of the defendant evidence was introduced tending to prove that the plaintiff was intoxicated and that the conductor requested him to step inside the car, but that he refused to do so. Three witnesses, passengers, who were standing up in the car, testified that they did not observe anything unusual about the motion of the car. It appeared that people were standing in the aisle and upon the platform from which the plaintiff fell, but it does not appear that the equilibrium of any other person was disturbed by the motion of the car in rounding the curve. While it is well set-

ted that it is not negligence *per se* for a passenger to occupy a position on the platform of a crowded car if accepted as a passenger, such person must be held to assume the ordinary risks incident to such a position. This proposition seems so clear as to require neither argument nor citation of authority to support it. Every one knows that in the usual operation of cars propelled by electricity there is inevitably a certain amount of jolting and swaying, particularly when rounding curves. It was incumbent upon the plaintiff to prove that he was thrown from the car by reason of some unusual movement caused by its negligent operation, and in my judgment the characterization of the speed of the car as "pretty swift," and as "about nine miles an hour," and of the movement as not being an "ordinary jog," is insufficient to make a case, particularly where it appears that other persons in the same situation as the plaintiff observed nothing unusual. (*Moskowitz v. Brooklyn Heights R. R. Co.*, 89 App. Div. 425; *affd.*, 183 N. Y. 521; *Ayers v. Rochester Railway Co.*, 156 *id.* 104.) According to the plaintiff's own testimony he was doing nothing whatever to protect himself, and it is just as likely that the ordinary movement incident to the rounding of a curve was the force that caused him to fall as it is that any unusual thing occurred, but even if I am in error in this regard, it must be clear that the plaintiff has entirely failed to prove freedom from contributory negligence. The plaintiff knew all about the situation, he knew that he was in a position that exposed him to the danger of being thrown by any jolting or swaying of the car, and yet according to his own testimony he did nothing whatever to protect himself, and did not even look to see whether there was anything from which he could obtain support. In the absence of any evidence tending to show the exercise on his part of the slightest care, I do not see how it is possible to hold that he met the burden of proving freedom from contributory negligence.

It, therefore, follows that the judgment and order should be reversed and a new trial granted, costs to abide the event.

JENKS, HOOKER and RICH, JJ., concurred.

Judgment and order reversed and new trial granted, costs to abide the event.



App. Div.]

Second Department, March, 1906.

SOPHIA C. HOFFMAN, Respondent, v. METROPOLITAN EXPRESS  
COMPANY, Appellant.

Second Department, March 9, 1906.

**Carrier of goods — bill of lading constitutes contract — erroneous charge  
— evidence — statements of carrier's servant made after delivery of  
goods inadmissible.**

The receipt or bill of lading issued by a common carrier of goods constitutes the contract between the parties, and the shipper who receives it without objection is bound by the terms thereof in the absence of misrepresentation, fraud or concealment of the carrier.

Hence, in an action by the shipper to recover for injury to goods, it is error to charge, in substance, that the plaintiff is not bound by clauses in such bill of lading restricting the carrier's liability, if the plaintiff did not know of said terms and no steps were taken by the carrier to bring the same to her knowledge. Nor is such error cured by a subsequent charge ruling that the question of the plaintiff's knowledge of the terms depended upon the exercise of "due care" in apprising herself thereof.

As the jury may have found for the plaintiff by reason of such erroneous charge, it is immaterial that the delivery of such receipt was in issue, or that the plaintiff contended that there was an oral contract by the carrier to transport the goods without rehandling. There can be no certainty that the verdict was based on these latter issues.

It is error to admit evidence of statements made by the carrier's employee after the delivery of the property to the effect that the goods were not in good condition when delivered.

**APPEAL** by the defendant, the Metropolitan Express Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Westchester on the 12th day of May, 1905, upon the verdict of a jury, and also from an order entered in said clerk's office on the 12th day of May, 1905, denying the defendant's motion for a new trial made upon the minutes.

*Arthur K. Wing*, for the appellant.

*J. Addison Young*, for the respondent.

MILLER, J. :

The plaintiff has recovered a judgment for injuries to a painting alleged to have been caused while in the defendant's possession as a

common carrier. The plaintiff's evidence tended to show an oral contract to carry the property by van without rehandling from her residence in the city of New York to a place in New Rochelle. The defendant admitted receiving the property for carriage, but denied the special contract, claiming that it was to be carried by van to the defendant's station and there transferred to a car, as was done. The defendant disputed that the picture was injured while in its possession and sought exemption from liability under the usual receipt or bill of lading claimed to have been delivered to the plaintiff upon the receipt of the property. The plaintiff denied that any receipt or bill of lading was given, claiming that she received merely a duplicate of the tags placed on the different articles shipped, containing simply a description of the articles, which, however, she says she did not read. Neither the original nor duplicate receipt was produced at the trial, but an alleged copy was produced which the witness admitted was only made a few days before the trial. By the charge of the learned trial court the verdict of the jury was made to depend upon two questions of fact, viz., *first*, whether the property was negligently injured by the defendant, and, *second*, whether the parties agreed upon the terms contained in the shipping receipt claimed to have been delivered by the defendant to the plaintiff. Respecting the latter question, the court charged the jury: "So if you find that this woman agreed to the terms of this paper which the company produce, then she is bound by its terms, and she is defeated in this law suit. But if you find that she did not know the terms of the agreement, that no steps were taken by the party who presented it to her to bring it to her knowledge, that the printed matter on the paper was never called to her attention, that it was given to her as a receipt only for the goods and she was unaware of the fact that it contained unimportant\* statements binding her, depriving her of certain legal rights that she otherwise would have had in making this bargain with the company, then you may take that and all these things into consideration in deciding whether there was such an agreement or not." An exception was taken to this portion of the charge and the court was requested to charge that "if this contract, this yellow

---

\**Sic.*

App. Div.]

Second Department, March, 1906.

paper, Exhibit No. 2, was given to the plaintiff by this defendant, at the time of the receipt by the latter of these goods for shipment, and if there was no fraud or misrepresentation upon the part of the defendant the contract as constituted is binding and becomes the contract of shipment in this case," to which the court replied, "I will say this: That if they gave her the paper, Exhibit No. 2, at the time the contract was entered into, and made no concealment of its contents, and she could by exercise of due care have ascertained what it was, then it is a contract," and an exception was taken to the refusal of the court to charge as requested. This charge did not correctly state the rule of law applicable, and must have misled the jury upon a vital point in the case, because the proposition is now too well settled to admit of discussion that the receipt or bill of lading is the contract (*Long v. N. Y. C. R. R. Co.*, 50 N. Y. 76; *Hinckley v. N. Y. C. & H. R. R. Co.*, 56 id. 429), and that the shipper who receives it without objection, in the absence of misrepresentation, fraud or concealment, is bound by its terms and cannot set up his failure to read it in order to prevent its legal effect. (*Belger v. Dinsmore*, 51 N. Y. 166; *Germania Fire Ins. Co. v. M. & C. R. R. Co.*, 72 id. 90; *Hill v. S., B. & N. Y. R. R. Co.*, 73 id. 351; *Mills v. Weir*, 82 App. Div. 396.) Manifestly the portion of the main charge quoted conflicts with this rule, nor was the error cured by the response to the request to charge which in effect made the question depend upon whether the plaintiff exercised "due care" in apprising herself of the contents of the receipt. If the receipt was given to her she was bound to know its contents, unless prevented by some artifice or misrepresentation. The respondent contends that the jury could have found that the alleged receipt was never in fact delivered to the plaintiff, but we cannot say that the jury ever passed on this question. The charge authorized the jury to find that even if the receipt was delivered as claimed, it did not constitute a contract between the parties unless the plaintiff knew its contents so that there was a meeting of the minds or at least unless in the exercise of due care she ought to have apprised herself of its contents. We might say that due care required the shipper to read a receipt delivered to him under such circumstances, but injecting that question into the case could have had no other effect than to mislead the jury, particularly where the court in the main

charge had distinctly called attention to the fact that the receipt was not the agreement of the parties unless the plaintiff knew its contents.

The respondent also contends, under the authority of *Maghee v. Camden & Amboy R. R. Co.* (45 N. Y. 514), that the defendant, having departed from the terms of the oral contract testified to by the plaintiff by conveying the property over a portion of the route by car instead of all the way by van without rehandling, became an insurer without regard to the exemption contained in the shipping receipt, but the difficulty with this position is that we cannot know whether the jury resolved that question in favor of the plaintiff. The defendant denied the making of any such agreement and for aught that we know the jury may have found that none was made. Indeed, that question was not distinctly presented to the jury by the learned trial court, and the jury may never have passed upon it at all. Were the question presented it might be necessary to determine whether the alleged parol agreement constituted a variance of the written instrument, and whether all the prior negotiations were merged into the written receipt.

Irrespective of the foregoing, this judgment will have to be reversed for an error in the admission of evidence. The plaintiff was permitted to prove as a part of her case statements made by one of the defendant's servants after the delivery of the property, to the effect that the goods were not in good condition when delivered. Manifestly this was reversible error, because upon no possible theory could the defendant be bound by the admission of its employee after the transaction.

The judgment and order must be reversed and a new trial granted, costs to abide the event.

HIRSCHBERG, P. J., WOODWARD, GAYNOR and RICH, J.J., concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

pp. Div.]

Second Department, March, 1906.

PATRICK DAVIS, Respondent, v. THOMAS F. MARTIN, Appellant.

Second Department, March 9, 1906.

**negligence — master and servant — failure of plaintiff to show employment — evidence — burden of proof.**

In an action by a workman to recover for injuries received by him in the fall of a scaffold, he has not met the burden cast upon him to show his employment by defendant, by simply showing that the defendant was about the building, giving directions, and that he handed to some of the men the amounts due them for wages, and, after the accident, paid to plaintiff the amount due him, when it appears that the defendant was the president of a corporation, dealing in real estate, engaged in the construction of the building, and that the contracts for the erection of the building where plaintiff was injured were let to independent contractors, one of whom testified that he employed plaintiff.

The burden of proof is on plaintiff to establish his employment, and he cannot recover on the weakness of defendant's testimony.

IRSCHBERG, P. J., dissented.

APPEAL by the defendant, Thomas F. Martin, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 18th day of April, 1905, upon the verdict of a jury for \$500, and also from an order entered in said clerk's office on the 14th day of April, 1905, denying the defendant's motion for a new trial made upon the minutes.

*Robert H. Roy*, for the appellant.

*Henry A. Powell*, for the respondent.

MILLER, J.:

This is an ordinary scaffold case, and the only question requiring consideration on this appeal is whether the plaintiff met the burden of proving that the relation of master and servant existed between himself and the defendant. The learned trial court properly charged the jury that the plaintiff could not recover unless such relation existed, and the question is raised by motions for a non-suit. The plaintiff testified that he was employed as a hodcarrier by one Gleason; that the defendant was about the premises at different times giving directions to the men, and that after the accident the defendant personally handed plaintiff the money due him.

as wages. Other witnesses for the plaintiff testified to being employed by said Gleason and being paid by the defendant, and to the fact that the defendant was constantly upon the premises giving directions, and one witness testified that the defendant personally assisted in the erection of the runway which fell, causing the plaintiff's injuries. On the part of the defendant it appeared undisputed that the defendant's father was the owner of the premises, and that the defendant was the president of a corporation known as the Thomas F. Martin Realty Company. The defendant testified that, acting for said corporation, pursuant to an arrangement with his father, he was engaged in the construction of the building upon which the plaintiff was working at the time of the accident; that he let the work to different contractors, and that said Gleason contracted to do the mason work for a lump sum. He admitted that he was on the premises giving directions to the end that the contracts should be performed properly and the materials furnished properly used. The said Gleason testified that the plaintiff was his servant, and that he was doing the mason work pursuant to contract with the Thomas F. Martin Realty Company. There is no evidence to disprove the testimony of the defendant to the effect that he was acting solely as the president of the realty company, but assuming, without deciding, that, he being an interested party, this evidence, although undisputed, was for the jury, there is still the testimony to the effect that Gleason, by whom the plaintiff was employed, was an independent contractor, and the fact that the defendant was on the premises giving directions and personally handed to some of the men money for their wages is not inconsistent with such testimony. This question must be considered in the light of the fact that the burden was upon the plaintiff to prove his case. He must, therefore, prove more than a mere possibility that the fact was as claimed by him. The respondent urges that there are certain discrepancies and improbabilities in respect to certain portions of the testimony of the defendant and of said Gleason, and that for this reason their credibility was for the jury. The difficulty with this contention is that the plaintiff cannot rely upon the weakness of the defendant's testimony, and there is nothing whatever in the record, other than the facts already alluded to, which indicates that the relations of the parties were not as shown by the defendant's evi-

ence, and as these facts are in no wise inconsistent with such evidence, it is manifest that the plaintiff has failed to sustain the burden of proving his case. The verdict is, therefore, without evidence to sustain it, and must be set aside.

The judgment and order should be reversed and a new trial granted, costs to abide the event.

WOODWARD, GAYNOR and RICH, JJ., concurred; HIRSCHBERG, J., dissented.

Judgment and order reversed and new trial granted, costs to abide the event.

---

JACOB D. REMSEN, Appellant, v. THE NEW YORK, BROOKLYN AND MANHATTAN BEACH RAILWAY COMPANY and THE LONG ISLAND RAILROAD COMPANY, Respondents.

Second Department, March 9, 1906.

**Ejectment—when such action triable before jury although incidental equitable relief is demanded.**

A complaint which demands the recovery of possession of lands with an incidental request that the defendant railway in possession thereof be compelled to remove its tracks, and be enjoined from using the same, states a mere action for ejectment and should be tried before a jury. The fact that incidental equitable relief is asked does not deprive the defendant of its right to a jury trial as such relief would be given in the common-law action.

HOOVER, J., dissented, with opinion.

**APPEAL** by the plaintiff, Jacob D. Remsen, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 1st day of November, 1905, sending this action from the equity calendar to the jury calendar for trial.

The complaint alleges that the defendant is in possession of the land in question and that its railroad runs over it. In addition to giving possession of the land, the complaint prays for relief that the defendant remove its tracks and cease to run trains over the land. (For more complete exposition of the complaint, see dissenting opinion of HOOKER, J., *post.*)

*Hector M. Hitchings*, for the appellant.

*L. J. Carruthers* [*Joseph F. Keany* with him on the brief], for the respondents.

GAYNOR, J. :

This verbose complaint alleges nothing but a cause of action for the recovery of the possession of real property. That the defendant is a steam railroad company, and has tracks on it and runs trains of cars over it, does not make the suit one in equity. If the plaintiff recovers possession, and the defendant leaves its ties and rails after it, that presents no case calling for the assistance of a court of equity. The plaintiff's own hands will suffice. And it is to be presumed that when the plaintiff gets into possession by a common-law judgment the defendant will not run a train of cars over him or his property before he can pull up the ties and rails. If the defendant should be guilty of continuous trespass upon his property after he is given possession, which cannot be presumed, equity will give protection then.

And if there were some incidental equitable relief needed to supplement a common-law judgment for the plaintiff, that could not deprive the defendant of its right to trial by jury. The action would still be ejectment, and such incidental relief could be given by the court at the same time (*Davis v. Morris*, 36 N. Y. 569). The case of *Hahl v. Sugo* (169 N. Y. 109) is not to the contrary; it is nothing but an illustration of the old rule against the splitting of causes of action (*Bendernagle v. Cocks*, 19 Wend. 207). It does not decide anything about the right to a jury trial. It only holds that the plaintiff there had only one cause of action, *i. e.*, a common-law cause of action of ejectment in which some incidental equitable relief might be appropriate under our practice system, and not that he had two causes of action, *i. e.*, one at law and the other in equity. If it had held the latter, it could not have held that the plaintiff should have united the two causes in one action. No one is obliged to do that. The rule is only against splitting one cause of action.

The order should be affirmed.

WOODWARD and JENKS, JJ., concurred; HIRSCHBERG, P. J., concurred in result; HOOKER, J., read for reversal.



HOOKEE, J. (dissenting):

The complaint herein alleges that the New York, Bay Ridge and Jamaica Railroad Company, the predecessor of the defendant, the New York, Brooklyn and Manhattan Beach Railway Company, went into possession of a piece of property some forty-four feet wide and over eighteen hundred feet long in 1877 under an oral license from plaintiff's father, and that the defendant, the Manhattan Beach Railway Company and its lessee, the Long Island Railroad Company, have continued in possession until the present time. The complaint also alleges ownership of the property by the plaintiff and revocation of the license and continued and wrongful possession by the defendants. It is also alleged that the plaintiff owns mortgages upon property adjoining the strip on which the railroad tracks still exist; that the defendants contemplate the erection of a viaduct thereon and that the plaintiff has no adequate remedy at law. The prayer for judgment is that the defendants surrender to the plaintiff the quiet and undisturbed use and possession of the strip of land; that they remove therefrom all tracks, ties, sleepers, fences and other appurtenances, and that they be enjoined and restrained from continuing in the use and occupation of the lands for a steam railroad or any other purpose hostile to the plaintiff's right of quiet and undisturbed possession.

The court below has held that this is an action at law to recover the possession of real property triable by a jury. The appellant insists that it is not an action in which a trial by jury is a matter of right. If the appellant is correct the order must be reversed and the case restored to the calendar of the Special Term for the trial of issues of fact.

The plaintiff claims a right to recover possession of his land. Were the lands not burdened by the tracks, ties and other appurtenances of the defendants, the railroad companies, a mere allegation of ownership by himself and wrongful possession by the defendants is all that would be required, and this would lead to a simple judgment for the recovery of the real property. The action would then be what is commonly known as an action of ejectment, and the sheriff under the execution would put the plaintiff in possession. The facts, however, are such that the plaintiff is justly warranted in alleging more. He says that the lands are burdened with

First Department, March, 1906.

[Vol. 111.]

appurtenances incident to the construction and operation of a railroad, the fair inference being that it will not be practicable for him or the sheriff to remove them. He claims, inasmuch as the possession by the defendants is wrongful, that they should be required to surrender up the premises unburdened in that manner, and that the removal of the appurtenances should be by the defendants themselves, for without such removal there could be no real transfer of possession. His complaint alleges sufficient facts to justify equitable relief, and he is warranted in demanding relief that the defendants remove their tracks and appurtenances and be enjoined and restrained from continuing in the use and occupation of the land as and for steam railroad purposes. The action is, therefore, not a pure action for the recovery of real property, and hence triable by jury, but becomes an action in equity. (*Corning v. Troy Iron & Nail Factory*, 40 N. Y. 191; *Broiestedt v. South Side Railroad Co. of Long Island*, 55 id. 220; *Hahl v. Sugo*, 189 id. 109.)

The order should be reversed, with costs.

Order affirmed, with ten dollars costs and disbursements.

---

MOSES TANENBAUM, Appellant, v. FEDERAL MATCH COMPANY,  
Respondent. (Action No. 2.)

First Department, March 9, 1906.

**Contract to pay commissions on fire insurance — no commissions recoverable on insurance furnished to replace canceled policies — evidence — payment of commissions may be shown by judgment roll in former action.**

Under a contract which requires the defendant to carry certain fire insurance and to pay the plaintiff a commission on the insurance furnished by him, the plaintiff is not entitled to commissions on insurance furnished by him to take the place of other insurance which was canceled by the insurers, and on which the defendant had already paid commissions. This is so, although the amount of insurance to be carried had been modified by consent of parties.

The fact that the defendant has paid commissions on the insurance annually issued may be shown by the judgment roll in an action between the same parties, in which that fact was established.

APPEAL by the plaintiff, Moses Tanenbaum, from a judgment of the Supreme Court in favor of the defendant, entered in the office

App. Div.]

First Department, March, 1906.

of the clerk of the county of New York on the 25th day of May, 1905, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 7th day of June, 1905, denying the plaintiff's motion for a new trial made upon the minutes.

*Ernest Hall*, for the appellant.

*Dickinson W. Richards*, for the respondent.

PER CURIAM :

The facts here presented are substantially the same as those presented on the former appeal (*Tanenbaum v. Federal Match Co.*, No. 2, 102 App. Div. 524), and the judgment would be affirmed on the opinion then delivered were it not for the fact that upon the argument of the present appeal it was suggested that the justice writing the former opinion misapprehended the facts, especially as to the amount of insurance which the defendant was required to take during the first nine months of the term of the contract, and also in assuming that the policies which were issued after the fire were not new insurance, but simply to take the place of policies which had been canceled.

The contract was for a term of ten years from the 10th of November, 1900, and required the defendant to carry, for that period, at least \$50,000 insurance for each year. It is true the contract was modified to the extent claimed by the appellant's counsel, which fact was overlooked by the justice writing the former opinion, but this in no way changed or affected the legal rights of the parties under the contract as there determined. It was then held that under the terms of the contract the plaintiff was obligated to furnish the defendant at least \$50,000 of insurance per year and to keep the same good during the year, the defendant paying therefor on demand four per cent commission or \$4 on each \$100 of insurance. Under the modification of the contract only \$30,000 of insurance was taken for the first three months and \$40,000 for the next six months. This amount was furnished by the plaintiff and paid for by the defendant. A portion of this insurance, \$7,500, having been canceled before the expiration of the year, the plaintiff was bound to furnish other insurance for a similar amount

without any further payment by the defendant. This he in effect refused to do by insisting, when he furnished such insurance, that the plaintiff must pay therefor an additional four per cent on each \$100 of the same, irrespective of whether it was issued to take the place of canceled insurance or not. This was not new insurance. It was simply to take the place of the insurance which had been canceled by the companies issuing the policies. The fact that more was on merchandise and less on machinery did not change the situation. The defendant had paid for \$7,500 of insurance, to take the place of which these policies were issued, and the plaintiff could not attach, when he furnished such policies, a condition that the defendant should pay four per cent on each \$100 thereof. Defendant was under no obligation to pay such charge. This was settled and determined in the action brought by the plaintiff against this defendant to recover such sum, and for the purpose of showing that fact the judgment roll in that action was properly received in evidence on the trial of this action. The case of *Flagg v. Fisk* (93 App. Div. 169), cited by the appellant, is not in conflict with the decision here made.

For these reasons and those assigned in the former opinion the judgment and order appealed from should be affirmed, with costs.

Present — O'BRIEN, P. J., PATTERSON, McLAUGHLIN, LAUGHLIN and HOUGHTON, JJ.

Judgment and order affirmed, with costs.

---

**THE ANGLO-CONTINENTAL CHEMICAL WORKS, LIMITED, Respondent, v. JAMES ST. GEORGE DILLON and GEORGE MACLAGAN, as Executor, etc., of JAMES HARTFORD, Deceased, Defendants.**

**ARCHIBALD C. SHENSTONE, Appellant.**

First Department, March 9, 1906.

**Attorney and client — substitution of attorneys — attorney retaining lien on papers until payment.**

Although a client has an absolute right to substitute attorneys, an attorney not guilty of misconduct should be allowed to retain his client's papers on such substitution until the amount due him is ascertained by reference and is paid.

APPEAL by Archibald C. Shenstone from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 14th day of November, 1905, granting a substitution of attorneys and directing the surrender of the papers in the action without terms.

*Archibald C. Shenstone*, appellant, in person.

*Edmund L. Mooney*, for the respondent.

PER CURIAM:

The appellant has been the attorney of record in this action for the defendant MacLagan since the commencement of the action. The order here appealed from was granted upon the motion of the defendant MacLagan, the granting of the order evidently being based upon the absolute right of a party to change his attorney, as no misconduct on the part of the appellant or cause for the substitution is shown.

That a party has the absolute right to change his attorney is without question in this State. Under rule 10 of the General Rules

Practice, however, the rights of the attorney should be protected where no misconduct is shown, and this requires that when an attorney has rendered services and has received no compensation therefor, a substitution should not be granted without protecting his lien. The application of the rule requires, in the present case, that a reference should be ordered to determine the amount due the attorney, the latter to be allowed to retain the papers until the amount due him is determined and paid; that part of the order, however, which directs substitution to stand.

The order appealed from should be modified accordingly, and as modified affirmed, with ten dollars costs and disbursements to the appellant.

Present — O'BRIEN, P. J., PATTERSON, INGRAHAM, LAUGHLIN and CLARKE, JJ.

Order modified as directed in opinion, and as modified affirmed, with ten dollars costs and disbursements to the appellant. Settle order on notice.

LOUIS J. ALTKRUG and JACOB W. KAHN, Respondents, v. ROSE HOROWITZ, Appellant.

Second Department, March 2, 1906.

**Attorney and client — proof insufficient to show retainer by wife when brought in as party defendant in suit against husband — evidence — objection to narration by witness.**

Action by attorneys for professional services.

When attorneys have been employed by a husband to defend an action, and, on the wife being brought in as a party defendant, are told by the husband in the wife's presence "to go ahead and defend her," to which statement she made no reply, proof of such fact is insufficient to show a retainer by the wife, especially when the services rendered to the wife were incidental to the defense of the action against the husband.

An objection to a narration by a witness is good; for counsel have a right to have testimony brought out by question and answer in order to protect the client's interest by objection rather than by motion to strike out.

APPEAL by the defendant, Rose Horowitz, from a judgment of the Municipal Court of the city of New York, borough of Brooklyn, in favor of the plaintiffs, entered in the office of the clerk of said court on the 2d day of February, 1905.

*Mark D. Goodman*, for the appellant.

*Jacob W. Kahn*, for the respondents.

PER CURIAM:

The action is for legal services. A suit was brought in the Supreme Court against the defendant's husband. When it came to trial it was marked off the calendar for a defect of parties, and the plaintiff sent to Special Term to move to bring in the defendant, who thereupon was brought in. The case was finally settled without trial. One of the plaintiffs testifies that he had been retained in that suit by the husband at the outset, and that at or about the time the defendant was brought in the husband, in the presence of the defendant, told him "to go ahead and defend her," and that she did not join in the conversation, but must have heard it. He testifies that he thereafter prepared an answer for her, and that he had one consultation. On the other hand, the defendant testifies that

App. Div.]

Second Department, March, 1906.

she gave the summons and complaint served upon her to her husband for his attention; that she never was present at any conversation when her husband told the plaintiff to go ahead and defend her, or made any similar remark, and that she never subscribed any answer in that suit. Her husband corroborates her. It does not appear that any claim was ever made upon the defendant until just before this action was begun.

We think that the proof fails to establish liability on the part of the defendant. Subsequent to the time of the alleged retainer by effect of her silence, there is no testimony that estops her. There are no facts shown as to any communication made to her, or as to any services rendered which should have caused her to suppose that she was liable therefor. The plaintiffs must, therefore, rest upon her alleged silence at the alleged interview. Of course, agency may be implied from conduct and acquiescence on the part of the alleged principal. But the evidence is not sufficient, under the circumstances of this case, to apply that principle. This was primarily an action against the husband; these plaintiffs were then his attorneys and had received his retainer, and even if the husband did tell one of them in the wife's presence to go ahead and defend it for his wife, it is more than doubtful whether her silence is sufficient to imply his agency to retain them as her attorneys so as to charge her with liability for services in that suit. Certainly in the face of the testimony of the defendant and of her husband to the contrary, the plaintiffs have not sustained the burden of proof. There is every indication that the services rendered to the defendant were such as would have been rendered to the husband as entirely incidental to the protection of his interests if he had remained the sole defendant, save the preparation of the answer, which the defendant testifies without contradiction that she never subscribed. The fact that the husband is in bankruptcy may be some indication why this action was brought against his wife, for there is no satisfactory evidence that the action against her was not an afterthought. Some exceptions taken to rulings on the evidence are open to criticism, but, in view of the new trial, it is not necessary to discuss them, as they are to be criticised, not for radical error, but for unduly limiting the inquiries of the defendant. One, however, may be noted. We think that when counsel objects to narration by a witness he has the

right to have the testimony elicited by question and answer, in order that he may protect his client by objection rather than by a motion to strike out.

The judgment should be reversed and a new trial ordered, costs to abide the event.

HIRSCHBERG, P. J., WOODWARD, JENKS, RICH and MILLER, JJ., concurred.

Judgment of the Municipal Court reversed and new trial ordered, costs to abide the event.

---

MARY C. BURKE, as Executrix, etc., of THOMAS P. BURKE, Deceased, Respondent, v. JOSEPH F. BAKER and Others, Appellants, Impleaded with the CITY OF NEW YORK, Defendant.

Second Department, March 2, 1906.

**Attorney and client — contract for contingent fee sustained — evidence — diary of deceased attorney admissible to show services rendered.**

Clients who after retaining an attorney have discharged him and substituted other attorneys, and thereafter finding that his services are necessary by reason of his special fitness have re-employed him under written contracts giving him a contingent fee, cannot thereafter complain that he drove a hard bargain. Deductions from the amount due are not proper merely because the case was tried in court by the other attorneys employed, as the labor of the preparation of a case may be greater than the trial thereof.

When such attorney is dead it is not error to admit his diaries in evidence to show the services rendered.

APPEAL by the defendants, Joseph F. Baker and others, from portions of a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Queens on the 4th day of May, 1904, as resettled and amended by an order entered in said clerk's office on the 19th day of August, 1904, upon the decision of the court rendered after a trial at the Queens County Special Term.

*William W. Goodrich* [*Nelson Smith* with him on the brief], for the appellants.

*Thomas F. Magner* [*John F. Carew* with him on the brief], for the respondent.



App. Div.]

Second Department, March, 1906.

## PER CURIAM :

The learned Special Term at first blush thought that the plaintiff's testator did not perform his contract, and so ordered a reference to determine what deduction should be made from the stipulated compensation, because another had presented the case in this court. On reargument the court wrote that it had been in error, and a more careful reading of the testimony had convinced it that the testator had fully performed his contract before his death.

The issue tendered by the pleadings and adhered to very near the close of the plaintiff's case, was that the written agreement for compensation made by each defendant with Mr. Burke was not understandingly executed by the defendant, and that an essential condition thereof was that Mr. Burke was to have the men reinstated within thirty days.

We think that there is no ground that warrants our disturbance of the findings of the court that Mr. Burke performed his contract. (*Lowery v. Erskine*, 113 N. Y. 52.) The position of the city required, *inter alia*, evidence to meet its contention that the appropriation had been exhausted. That this was the crucial point is evident from the opinion of the court at Trial Term. (*People ex rel. Gleason v. Scannell*, 69 App. Div. 401.) To produce such evidence required thorough, exhaustive and painstaking labor. Mr. Burke, as former corporation counsel for Long Island City, had been naturally in close touch with its affairs during the period in question. He was, so to speak, a legal specialist, particularly acquainted with the facts, or at least knowing where to look for them readily. There is evidence that the other attorneys and counsel had not seen fit to prepare themselves upon these facts, that they had indeed called upon their clients to furnish the evidence, and that in this extremity, Mr. Burke and his associate were called into the case by the clients. Mr. Burke had been in association with Mr. Stevens, the original attorney or counsel. But that relationship had ended by the entry of the order of substitution of Grady, Smith and Crandall upon the consent of Mr. Stevens and the adjustment of Mr. Stevens' fees. When Mr. Burke was again called upon and accepted the retainer, the relationship of client and attorney began *de novo*. He may have driven a hard bargain with his clients, but there was no duress.

They had discarded him and then found that they needed him, *Non constat* that others could not have prepared the case as he prepared it, perhaps with greater labor and less facilities. But that his services from his experience and knowledge were peculiarly valuable, or were deemed essential, affords no reason for upsetting the agreement in that he demanded and received a very large compensation. On the other hand, the fee was contingent, and this element cannot be excluded in viewing the amount thereof. Moreover, if the men were reinstated they virtually gained life positions in a certain service. Not only is it clear that the issue required such work as Mr. Burke did on the case, and that in the nature of things the work required long and arduous labor, but there is evidence that such labor was done, that it was well done, and that the attorney and counsel with whom Mr. Burke became associated knew that it was doing and reaped the benefit of it. Any lawyer knows that often the great burden of the labor in the preparation of a case is done not by him who tries it as a barrister, but by some other, who does not figure at the trial and whose voice is not heard in the court, who has no recognition from outsiders, but to whose patient and painstaking labor the result is greatly due, even though the client himself may not realize it. We cannot see how the appellants can now be heard to complain of the amount of the compensation. For at the trial the plaintiff had witnesses at hand to testify to the fairness of the charge, and the court excluded them with the statement that it understood no attack was based upon that ground. The record shows that the learned counsel for the defendants "indicated assent to this" statement. We may say that the learned counsel contended that he made no such assent and sought, but in vain, to exclude it from the record, as appears by *Burke v. Baker* (104 App. Div. 26). We refused to interfere with the record, under the rule of *Ditmas v. McKane* (87 App. Div. 54), and cases there cited. We remarked in the opinion: "It is proper to add that we do not deem the concessions set out in this amendment as injurious to the defendants as their counsel seem to suppose it to be. The suit was brought to collect from a large number of firemen their salaries for the year 1899, which they were alleged to have assigned to the plaintiff's intestate for value received. The answers denied the alleged assignments and pleaded further that

App. Div.]

Second Department, March, 1906.

they were procured without consideration by false, subtle and deceptive promises, which were specifically set forth. Giving all force which can properly be given to any admission involved in the colloquy which has been mentioned, it left and leaves counsel for the defendants still at liberty to insist upon every denial and defense set up in their answers." In *Matter of Fitzsimons* (174 N. Y. 23) the court say: "In view of the fact that by express statute\* the right is conferred upon an attorney or counselor to regulate the amount of his compensation by agreement with his client, which is unrestrained and unlimited by law, we cannot see how such an agreement can be interfered with and held illegal until the question has been fully and fairly investigated and the facts relating to the transaction plainly established by a trial. The statute conferred upon the parties the right to make the contract, and conferred upon the court no authority to make it for them. If, however, upon a proper examination of the appellant's claim, it shall be found that the agreement between himself and his client was induced by fraud, or that the compensation provided for was so excessive as to evince a purpose to obtain improper or undue advantage, the court may correct any such abuse." (See, too, *Boyd v. Daily*, 85 App. Div. 581.) And in the latter case, speaking of the rule, the court also say: "This is not an inflexible rule. It is a rule of equity, and should not be rigorously applied where, owing to the death of the attorney, it is impossible for his representatives to make 'full or plenary proof.'" (Citing authorities.)

We do not think that it was error to admit in evidence the record of the testator's diaries in indication of the services rendered by him. (*Leland v. Cameron*, 31 N. Y. 115; *Livingston v. Arnoux*, 56 id. 507; *Fisher v. Mayor*, 67 id. 77.) The fact that there has been consolidation makes the total sum very large, but it must be remembered that the amount is to be paid by fifty-two defendants.

The judgment must be affirmed, with costs.

JENKS, HOOKER, GAYNOR, RICH and MILLER, JJ., concurred.

Judgment affirmed, with costs.

---

\* See Code Civ. Proc. § 66.— [RMP.]

WALTER E. CABBLE and Others, Appellants, v. ALBERT E. CABBLE and Others, as Executors, etc., of ELIJAH CABBLE, Deceased, and Others, Respondents.

Second Department, March 2, 1906.

**Infants — power of general guardian to sell stock left to infant by will — when price received therefor is adequate — valuation of stock in private business corporation — evidence — when expert opinion as to value excluded.**

The general guardian of infants who are legatees of personal property consisting of specific stock has power to sell such stock at a price which is adequate.

Hence when such infants are left stock in a private corporation the guardian may sell the same to other legatees managing the business if the price be fair. Such sale at most is voidable on the ground that the price was inadequate.

When the stock is that of a private family corporation owning no patents or monopoly and engaged in a manufacturing business, the success of which depends upon competition, which stock has no listed market value, its fair market value may be shown by the testimony of one who has been connected with the business and has personal knowledge of its affairs. Its worth is not to be measured by that set out in an inventory of the corporation, but at the probable market value on liquidation.

The valuation of such stock by the Special Term confirmed.

As such stock has no recognized market value, it is not error to exclude the opinions of expert witnesses having no knowledge of the corporate affairs based upon hypothetical questions only.

APPEAL by the plaintiffs, Walter E. Cabbie and others, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Kings on the 6th day of September, 1904, upon the decision of the court, rendered after a trial at the Kings County Special Term, dismissing the complaint upon the merits.

*Ellis L. Aldrich*, for the appellants.

*I. N. Sievright* [ *William H. E. Jay* and *David Tesse* with him on the brief] and *Hubbard Hendrickson*, for the respondents.

JENKS, J. :

Edward Cabbie died on February 15, 1889, testate. His brother, Elijah Cabbie, and his son, Walter Cabbie, were his executors. He

App. Div.]

Second Department, March, 1906.

left him surviving three sons and five daughters, and certain grandchildren, children of a deceased son. His estate consisted of \$16,000 and forty shares of stock in the William Cabbie Manufacturing Company. The scheme of the will that became effective vested the forty shares in his children and the grandchildren (*per stirpes*) share and share alike, and gave his other property likewise. The testator died suddenly, and so left an unexecuted will that shifted the scheme, for it vested the stock in his sons exclusively, and gave the other property to the daughters and the said grandchildren exclusively. A few days after his burial the scheme of the unexecuted will was carried out by the adult children. Three months later the mother of the said grandchildren, who meanwhile had become their general guardian, sold all of their interest in the stock to the said three sons of the testator. This is an action in equity brought by three of the said grandchildren, now of age, and by said general guardian and guardian *ad litem* of those who are infants, against the executors of Edward Cabbie and Walter Cabbie, deceased, to set aside the general release given to the said Edward and Walter as executors upon the transaction of the sale of the stock, and against the purchasers of the stock to set aside that sale. The Special Term found for the defendants and dismissed the complaint upon the merits.

The 5th clause of the will is a specific bequest of the said stock, as the testator directed that the shares "shall pass to and vest in my said children equally share and share alike." Exclusive of this stock the personal property discharged all of the testator's debts. The title to the stock vested in the legatees. (*Blood v. Kane*, 130 N. Y. 514, 517; *Matter of Mullan*, 145 id. 98, 104; *Chester v. Buffalo Car Mfg. Co.*, 70 App. Div. 443, 457.) The guardian of the infants had power to sell this personal property (Dwight Pers. & Pers. Prop. 277; *Field v. Schieffelin*, 7 Johns. Ch. 150), and, therefore, the sale was but voidable. I think that the appellants must fail, because all of the proof sustains the findings of the Special Term that the price paid was not inadequate. Even if we concede that the rule well stated by Kerr on Fraud and Mistake (3d ed. p. 136), as follows: "The principles which govern the case of dealings of persons standing in a fiduciary relation apply to the case of persons who clothe themselves with a character which brings them

within the range of the principle, or who take instruments, securities or moneys with notice that they have been obtained by a person filling a position of a fiduciary character from a person towards whom he stands in such relation," applies under the facts of this case, and that, therefore, the burden to show that the price was adequate so as not to "point directly to wrongdoing" (2 Big. Fraud, 505; see, also, 500 *et seq.*), was on the purchasers, yet I still think that the appellants must fail. The court finds that the estate in 1889, exclusive of the stock, was valued at \$16,224.72; that the value of the stock at that time did not exceed \$16,000, and that the value of the four and four-ninths shares which were sold by the guardian did not exceed \$1,776. It finds that the sons paid for the stock to the guardian \$888.88, and also executed such releases of their respective one-ninth shares of the estate, to which they were entitled under the will, so that the one-ninth share of the said infants became one-sixth. The guardian was paid in addition to the one-ninth share to which her wards were entitled under the will \$901.38, representing the amount of the sons' relinquishment, so that the guardian received for the four and four-ninths shares of the stock, in all \$1,790.26, or \$400 a share — the full value, as found by the court. The shares were of the capital stock of the William Cable Manufacturing Company, a domestic corporation organized in 1870, for a term of twenty-five years, capitalized at \$30,000 in 300 shares of a par value of \$100 each. It was a small, close family corporation, in that the stock was owned exclusively by the Cable family. It owned no trade mark, copyrights or patents. It was a going concern engaged in manufacturing as a competitor in the open markets. The testator was an officer of the company engaged in its business, and his sons had been from boyhood and were then engaged in its business as workingmen. The only witness who gave evidence as to the value of the stock was Joseph C. Cable, called by the plaintiffs. He had been connected with the company for thirty years, and a stockholder therein since 1879. He appears as indifferent between the parties. He gave a detailed description of the company, its history and its business as a going concern. He testified that there had been but one sale of the stock at public auction, at a price unknown to him, and one private sale twenty years before the time he testified, at \$150 a share. On cross-

App. Div.]

Second Department, March, 1903.

examination he put the value of the stock at the time of the sale now attacked at \$400 per share, and he reiterated his valuation on the redirect examination upon his original statement made on cross-examination. His testimony is criticized upon two grounds: *First*, in that the inventory of the corporation shows a valuation of \$248,095, from which it is argued that if there were distribution on that basis each share would be worth \$800. I think that we cannot conclude that the inventory of the property of a going concern, made by the officers thereof, is a safe indication of the price that would be realized from a present sale thereof and a distribution thereunder. What property may, in the opinion of its owners, be worth, regarded as in use by a going concern, for inventory purposes, and what it would fetch if the concern were wound up upon sale in open market, may naturally present a great variance. It does not appear that the inventory was on the basis of a sale or a distribution, but simply as a matter of book values to the corporation. The precise question was pressed upon the witness as follows: "Q. But based upon what you have just said, is what your conclusion would have been, to divide the inventory by the number of shares you had, would give the value of the stock at \$800 a share? A. Under the circumstances, my knowledge of what that consisted, I say no." *Second*. The dividends paid. They were certainly large, but then it must be remembered that they were not the result of any patent, but purely of the chances of competition in the open market. The price paid, \$400, was par plus \$300 for each share. This enhanced price was naturally due to the large dividends. There is a marked difference between a great corporation, with years of corporate life before it, in the control of a patent or in possession of a practical monopoly, and a small business conducted by a family in the form of a corporation, dependent upon the individual efforts of a few persons and engaged in open competition, with but six years of corporate life before it. With reference to the contention of the appellants that the value of the stock was \$800, as demonstrated by the inventory and dividends, I may cite the language of the court in *People ex rel. Knickerbocker Fire Ins. Co. v. Coleman* (107 N. Y. 541, 543, 544): "One mode of arriving at the actual value of the capital stock of a corporation is to take what is sometimes called the book value, which

is reached by estimating all the assets as they appear upon the corporate books, and deducting all the liabilities and other matters required to be deducted by law, and taking the balance as the measure of value for assessment. This seems to be a proper method for arriving at the value of the capital stock in the case of a corporation which is about to discontinue business, wind up its affairs and distribute its assets among its shareholders. But it cannot always, or usually, be a fair or correct method of assessment in the case of a going corporation whose assets are to remain at the risk of its business." The appraisal of Surrogate SILKMAN in *Matter of Brandreth* (28 Misc. Rep. 468 ; affd., 169 N. Y. 437) may also be noted.

There is a further consideration, which certainly is of some moral weight. The testator knew the business thoroughly ; he had grown up in it and with it daily, and was one of its chief officers. His will, executed in 1883, divided his estate — stock and other property — equally among his children. There was not a great variance between its earnings in 1883 and 1889. He died suddenly in 1889, leaving an unexecuted will. By that will he shifted his scheme of distribution. He did not thereby expressly discriminate as to one child against another, but he gave his shares of stock to his sons exclusively and the rest of his estate to his daughters exclusively. What was done by subsequent agreement among the legatees was to carry out the scheme of the second but unexecuted will. If the original scheme was equality, there is no indication that for any predilection or prejudice the testator intended to disturb that scheme by his later will. It cannot be said that under the scheme of the second will practical inequality was necessary from the character of his investment in the stock, for the reason that the testator once bequeathed the stock and the other property to all the children, share and share alike. Is it not then a fair argument that he thought that the division made, *i. e.*, stock to the sons and the other property to the daughters, was practical equality, and that if on the one hand the stock, so long as his sons remained in the business and its affairs went well, might perhaps be more profitable, still its value was more uncertain and more dependent upon the success of the venture than that of the assets of the other part of his estate ? He naturally regarded nine children and the children



App. Div.]

Second Department, March, 1906.

of his dead son. His estate outside of the stock was something over \$16,000. If the stock, in the opinion of the testator, was worth \$800 (as the appellants contend), then by the scheme of his unexecuted will he would have in effect left to his *three* sons \$32,000 and but one-half of that sum to his six other children, or have disturbed essentially his original scheme of equality by leaving to each daughter but one-fourth of the amount left to each son. On the other hand, while so marked a difference disturbed any scheme of practical equality, the difference if the stock had been worth \$400 would have been no more than might have represented the variance between the value of such corporate stock and that of the other property which consisted of cash or its certain representative. The comparison is between \$16,000 in stock and \$17,689 or \$16,624 net in cash. My comments may be somewhat fanciful or far fetched, but the disposition of the testator thus analyzed seems to throw some light upon the value of the stock in his judgment. Again, it does not appear that there has ever been any repentance of the bargain by any one save these plaintiffs. The only evidence on this subject is that of the testator's daughter, Mrs. Johnson, called by the plaintiffs, who testified: "I stood by the bargain and have not repudiated it in any way or tried to."

In any event I think that upon the direct testimony in the case the finding of the court as to the value of the stock is not "against the weight of evidence, or that the proofs so clearly preponderated in favor of a contrary result that it can be said with a reasonable degree of certainty that the trial court erred in its conclusions." (*Lowery v. Erskine*, 113 N. Y. 52, 55; *Foster v. Bookwalter*, 152 id. 166.) It appears, then, that as there was no inadequacy of price therefor this appeal cannot succeed. The language of the Court of Appeals in *Geyer v. Snyder* (140 N. Y. 394, 400) is applicable: "The plaintiff, in the brief of counsel submitted, seems to assume that upon the bare proof of a transaction with the executors by virtue of which, for an apparently good consideration, her interest in the estate was released or transferred to them; fraud will be presumed, and that the burden is at once cast upon them to show that no undue advantage was taken of her. This position is not supported by any principle of law or rule of equity which we have been able to find. If the beneficiary is competent to contract, the

trustee may deal with him without necessarily incurring the suspicion of bad faith. But if he buys an interest in the trust property or secures from the beneficiary a release to himself, and it is shown that the price was inadequate, or that he has made a profit out of the transaction, the law presumes fraud or concealment, or undue influence or some conduct inconsistent with loyalty to his trust, and places upon him the burden of proving that he disclosed to the beneficiary every circumstance relating to the condition of the property which he ought to know in order to form a correct judgment of its value, and that he exerted no undue influence to obtain the assent of the beneficiary to the bargain. It is here that the fatal weakness of plaintiff's case is to be found. She gave no proof of inadequacy of price or tending to show that the executors had made a large profit out of the property purchased. Had she shown that they obtained property of the estate worth \$280,000 for \$120,000, as she now alleges, or that for \$5,000 she released an interest in the estate which was of the value of \$10,000, that fact alone would have given rise to a very strong presumption that she had been defrauded by the executors, from the consequences of which they could not escape, except by the most satisfactory proof that no material information was withheld and that the sale was her own free, intelligent and deliberate act."

The only question of law that deserves consideration arises upon the rulings of the court in exclusion of the testimony of a corporation attorney, a broker, and a man engaged in like business, called as experts to answer as to the value of the stock upon hypothetical questions solely. These questions embraced the founding of the business, incorporation, capitalization, kind of business, dividends paid, book inventories and financial condition. This action is based upon the proposition that the price paid for the stock was inadequate. And the question was, what was the actual value of the stock at the time of the sale? There was no market value. In *People ex rel. Knickerbocker Fire Ins. Co. v. Coleman (supra)* the court, per EARL, J., indicates the data for actual value: "They may take into account the business of the corporation, its property, the value of its actual assets, the amount and nature of its present and contingent liabilities, the amount of its dividends and the market value of its shares of stock in the hands of individuals. They may resort to any

or all of these as to them seems best, and they are not confined to one of them. They may take that test which they think will be most likely to give them the actual value of the stock and they may disregard all the others. They are not bound to seek for all the evidence which bears upon value; that would be impracticable." Mr. Sedgwick on Damages (Vol. 1 [8th ed.], § 257) says: "Where there is no market value, the value of shares must be found by an examination of the affairs of the company." Cook on Stock and Stockholders (Vol. 1 [3d ed.], § 581) says: "The value may be shown by showing the value of the property and business of the corporation." In *Matter of Brandreth* (28 Misc. Rep. 468; affd., 169 N. Y. 437) Surrogate SIEKMAN took into consideration as the only manner of arriving at such value the actual property of the corporation and its earning capacity. When the facts which were germane to the determination of the worth of the stock were put before the court, or, if not all, the other facts were easily ascertainable, I think that the court did not err in excluding the opinion evidence of these experts. For correct inferences from the legitimate data for worth were as easily to be drawn by the court as by experts speaking from hypotheses. In the words of JOHNSON, C., in *Simpkins v. Low* (54 N. Y. 179, 185): "Why should a court be the only place where men most affect an ignorance of what all men know?" When the precise question for the court or jury is the actual value of stock (and market value does not exist, so that expert testimony as to that is not relevant to the question of worth or indicative thereof), and that question depends on the possessions and business of the corporation, and such information is detailed, together with the ordinary data of the number of shares, the corporate life, the character of its business, which of the essential facts cannot be stated or described to the court or jury in such a manner as to enable court or jury to form its judgment, so that expert testimony thereon is necessary? I cast my question after the rule enunciated in *Van Wycklen v. City of Brooklyn* (118 N. Y. 424, 429), where the court, per BROWN, J., say: "While it is no longer a valid objection to the expression of an opinion by a witness, that it is upon the precise question which the jury are to determine (citing authorities), evidence of that character is only allowed when, from the nature

of the case, the facts cannot be stated or described to the jury in such a manner as to enable them to form an accurate judgment thereon, and no better evidence than such opinions is attainable. (*Ferguson v. Hubbell*, 97 N. Y. 507; *Schwander v. Birge*, 46 Hun, 66; Greenl. on Ev. vol. 1, § 440, and note.\*) \* \* \* The rule is well stated by Justice BRADLEY, in *Schwander v. Birge* (*supra*), as follows: "The governing rule deduced from the cases permitting the opinion of witnesses is, that the subject must be one of science or skill, or one of which observation and experience have given the opportunity and means of knowledge which *exists in reasons rather than descriptive facts*, and, therefore, cannot be intelligently communicated to others, not familiar with the subject, so as to possess them with a full understanding of it."

"To the same effect it was said by Judge EARL, in *Ferguson v. Hubbell* (*supra*): 'Opinions are allowed when the facts cannot be adequately placed before the jury so as to impress their minds, as they impress the mind of a competent skilled observer. \* \* \* When the facts can be placed before a jury, and they are of such a nature that juries generally are just as competent to form opinions in reference to them, and draw inferences from them as witnesses, there is no occasion to resort to expert or opinion evidence.'" In *Littlejohn v. Shaw* (159 N. Y. 188, 193) GRAY, J., says: "When the question concerns a matter, as to which it may be fairly supposed that jurors are competent to reach a judgment from the exercise of that common knowledge which is attributable to men, the opinions of witnesses are not admissible." Lawson on Expert and Opinion Evidence (2d ed. pp. 483, 484) says: "The opinion of one who has been in the banking business for years, engaged in buying and selling bonds, is competent as to bonds of a kind he has not dealt in, and where he has no special knowledge of their market value. But one is not competent to give an opinion of the corporate value of stock, founded on its dividend-earning capacity. One who does not know the value of the plant of a corporation is not qualified to testify as to the value of its stock." In *Matter of Brandreth* (*supra*), Surrogate SILKMAN, speaking of a corporation somewhat similar so far as its holdings, the dealings in stock and its dividends

---

\* See 14th ed.—[REP.]

App. Div.]

Second Department, March, 1906.

were concerned, said: "It is at once apparent that it is practically impossible to produce expert evidence of the market value of this particular stock, and the only manner of arriving at its value is by taking into consideration the actual property of the corporation and its earning capacity." The learned counsel for the appellants cites *Sistare v. Olcott* (15 N. Y. St. Repr. 248) and *Moffitt v. Hereford* (132 Mo. 513). Those cases presented the question of the error of admitting the testimony, not rejecting it. Moreover, the question in *Sistare v. Olcott* (*supra*) was conversion, and the damages therefor were based upon the market price. (*Baker v. Drake*, 53 N. Y. 211.) In *Sistare v. Olcott* (*supra*) there is a dissent by VAN BRUNT, P. J., upon the admissibility of expert evidence.

I advise that the judgment be affirmed, with costs.

HIRSCHBERG, P. J., RICH and MILLER, JJ., concurred; HOOKER, J., concurred in result.

Judgment affirmed, with costs.

---

EDWARD F. ANDREWS, Appellant, v. H. & H. REINERS, Respondent.

Second Department, March 2, 1906.

**Negligence — injury by fellow-servant — evidence insufficient to show negligence of master in employing said servant.**

Evidence that the plaintiff's fellow-servant, who in driving a bung into a barrel accidentally struck the plaintiff, had previously, through carelessness, rolled a barrel down an elevator shaft, had rolled a keg down stairs, broken bottles, bruised his fingers, etc., without proof that these facts were known to the master, is insufficient to fasten negligence upon the master for employing an incompetent servant.

HOOKER, J., dissented.

APPEAL by the plaintiff, Edward F. Andrews, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 12th day of August, 1904, upon the dismissal of the complaint by direction of the court after a trial at the Kings County Trial Term, and also from an order entered in said clerk's office on the 26th day of September, 1904,

denying the plaintiff's motion for a new trial made upon the minutes.

*Frank F. Davis* [*Charles J. Belfer* and *Francis A. McCloskey* with him on the brief], for the appellant.

*Sidney Lowenthal* [*Ira Leo Bamberger* with him on the brief], for the respondent.

JENKS, J. :

The action is by servant against master for negligent employ of a fellow-servant whose accidental act injured the plaintiff. Plaintiff when at work in defendant's distillery leaned over a barrel to empty it. At that time the other servant, in attempting to start the bung out of another barrel, missed his aim and struck the plaintiff with the wooden bungstarter. The evidence of specific acts relied upon to establish liability of the master under the rule of *Park v. N. Y. C. & H. R. R. Co.* (155 N. Y. 215) is found wholly in the testimony of the plaintiff. *First*, he testifies that two months before, after this fellow-servant had lined up some empty barrels on the floor, one rolled down into the elevator shaft because the barrels were not wedged, and because the floor, instead of being level as intended by the construction, was very "bad and broke up" and slanting. *Second*, at another time when this servant was filling a keg standing on the floor it rolled downstairs. *Third*, at another time when the servant was carrying bottles by their necks, they dropped on the floor. *Fourth*, the fellow-servant had cut and bruised his own fingers. Two of these accidents might be traced to the faulty construction of the premises, while there is no proof that this fellow-servant knew or should have known of it at the times in question. The third is not very serious at most, and the fourth is trivial. But in any event there was no sufficient proof to fasten liability on the master. As to the first accident the witness testifies that there was no one on the floor at the time so far as he knew, and that he did not know whether "they knew of it or not." As to the second he testifies that Mr. Bishop, who I infer was some one in authority, was there "somewhere on the floor" immediately before or after. As to the fourth accident there is no proof that it was ever known to the defendant. As to the third accident plaintiff was asked whether anything was said on that occasion by any of

App. Div.]

Second Department, March, 1906.

the officers of the defendant with reference to the manner in which he (i. e., the alleged incompetent) did that. This was objected to unless the officer was specified. The court excluded it, but no exception was taken. The next question was "or by any individual." This was excluded under exception. The question was too broad. But even assuming that it had been answered that the defendant then and there found fault with the failure of the attempt to carry too many glass bottles, the bit of evidence would not have been sufficient. (*Baulec v. New York & Harlem R. R. Co.*, 59 N. Y. 356, 365.) Finally, the plaintiff testifies as to whether Mr. Reiners or Mr. Bishop were present on any of these occasions, that "they were somewhere on the floor" (which was 75 feet wide by 100 or 125 feet long), but where he cannot state. The evidence is too meagre to charge the defendant with knowledge or to hold it liable for ignorance, under the rule of *Park's Case* (*supra*), *Baulec's Case* (*supra*), and of *Cameron v. N. Y. C. & H. R. R. Co.* (145 N. Y. 400).

The judgment must be affirmed, with costs.

GAYNOR, RICH and MILLER, JJ., concurred; HOOKER, J., dissented.

Judgment and order affirmed, with costs.

---

ROOOL LAMBERTI, Respondent, v. SUN PRINTING AND PUBLISHING ASSOCIATION, Appellant.

Second Department, March 2, 1906.

**Libel**—publication wholly facetious cannot be made libelous by innuendo—demurrer to complaint.

When a publication, plainly humorous, relating to the plaintiff does not justify an innuendo ascribing to it a libelous meaning, a demurrer to the complaint will be sustained.

When a publication recounts a practical joke played upon the plaintiff, in which he was accused by his companions of being branded with a "Black Hand," and with being a member of a gang known by that name, such publication cannot be made libelous by an innuendo setting out that such gang was composed of assassins, blackmailers, thieves, etc., and a demurrer to the complaint should be sustained.

APPEAL by the defendant, the Sun Printing and Publishing Association, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 20th day of May, 1905, upon the decision of the court, rendered after a trial at the Kings County Special Term, overruling the defendant's demurrer to the amended complaint.

The plaintiff sued for libel in the printing of the following article concerning him in the newspaper of the defendant:

**"BLACK HAND ON HIS BACK.**

**"Janitor Lamberti Thought it Was a Curse Instead of a Wicked Joke.**

"Rocco Lamberti, janitor of the civil court at Second avenue and First street, and a protege of Timothy D. Sullivan, was marked with a black hand yesterday, and it was several hours before his friends could restore him to a normal condition. In Essex street he announced that he would aid his fellow-countrymen in the Italian Chamber of Commerce in running down the Black Hand Kidnappers.

" 'Why, you belong to it yourself,' said Big Jack Martin, Martin Engel's manager. 'A man told me he met you in a Turkish bath and saw the black hand tatooed on your back.'

" 'Liar, thief, villain,' shouted Rocco.

" 'I will take the man's word,' said Martin. 'He swears he saw the mark.'

" 'Here is \$20,' shouted Rocco, 'to prove he is a liar.'

" 'Go downstairs in the basement,' said Martin, 'and if there is not a black hand on your back I will lose the bet.'

"A committee of the Essex Market Bar Association followed Rocco to the basement. While he was removing his shirt and undershirt Martin blackened his right hand with burned cork.

" 'You scoundrels, show me where there is a black hand on my back,' said Rocco when he was stripped to the waist.

" 'Right there,' said Martin, as he slapped him on the back.

"The committee agreed with Martin, but to convince Rocco they had to procure two mirrors. When he saw the imprint on his back he turned pale and shouted: 'There must be a curse on me, a curse on me. I swear that the mark was not there this morning. I



App. Div.]

Second Department, March, 1906.

denounce them. Remove it from me, even if you have to cut off my flesh.'

"Rocco refused to be consoled and it required the services of several of the crowd to restrain him.

"When he was finally quieted the black mark was removed and he was told it was a joke, but the committee which celebrated with his money last night unanimously decided that he lost the bet."

He alleged: "That by the use and force of the said words thus composed and published by the defendant of and concerning plaintiff herein, it was meant to have it understood and believed that plaintiff had a 'Black Hand Tatooed on His Back,' which was an emblem or symbol of what is known as the 'Black Hand' or 'Black Hand Society,' which is known as a secret society or association composed of assassins, murderers, blackmailers, thieves and kidnapers, and which members are pledged to secrecy under penalty of death, and who make it their business to threaten, kidnap, blackmail, rob and kill persons for the purpose of blackmail, extortion and robbery, by means of such unlawful threats and acts. And it was further meant to have it understood and believed that plaintiff was tatooed with a 'Black Hand' on his back as a symbol or indication that plaintiff was a member or constituent part of and belonging to said criminal association or society, and that he is or was at the time of said publication, when the press in the United States at large, and in the city of New York in particular, was full of articles reporting the commission of numerous murders, kidnapping, blackmailing and extortion cases, alleged to have been committed by said secret society or the members thereof, a member of the said society or association. And it was further meant to have it understood and believed that plaintiff was pledged to the 'Black Hand' or 'Black Hand Society' and that such a symbol or insignia of the 'Black Hand' or 'Black Hand Society' was imbedded into his flesh, and by such insignia or emblem was known to have pledged secrecy to the 'Black Hand Society.' \* \* \*

"That the foregoing false, libelous, malicious and defamatory matter was intended and calculated to and did expose plaintiff to public ridicule, contempt, shame, disgrace, hatred and obloquy, and intended to degrade and did degrade plaintiff, and has injured plaintiff in his good name and reputation, which he had heretofore

enjoyed, all to his damage in the sum of Fifteen thousand (\$15,000) Dollars. \* \* \*

"That by reason of the said publication in defendant's newspaper, plaintiff has suffered and continues to suffer great mental distress, anguish and humiliation, and also received a severe shock to his nervous system. \* \* \*

"That by reason of the aforesaid publication or composition of and concerning plaintiff, plaintiff has been and still is called and known as the man with the 'Black Hand,' and the 'Black Hand Kidnapper' and the man with the 'Black Hand Tatooed on His Back,' meaning that this plaintiff is a member of the 'Black Hand Society,' which is known as a secret association composed of assassins, murderers, blackmailers, thieves and kidnappers, who make it their business to threaten, blackmail and kill individuals for the purposes of blackmail, extortion and robbery, all to his great annoyance, humiliation, detriment and disgrace, and has been shunned from society and avoided by his friends and acquaintances."

*Franklin Bartlett*, for the appellant.

*Joseph Pascocello*, for the respondent.

JENKS, J.:

To me it seems an absurd supposition that the article justifies the innuendo that it charged membership in the band known as the Black Hand. Any fair-minded man — any man of ordinary ability and intelligence, reading the entire print — could not so construe it. He who runs would read it as the story of a practical joke based on a physical pun — the existence of a "black hand" on the plaintiff's back — and published to provoke laughter.

My reading of the opinion in *Morrison v. Smith* (177 N. Y. 366) and the opinion therein referred to, read by LAUGHLIN, J., in the Appellate Division (Vol. 83, pp. 206, 209), is that the Court of Appeals decided that, although an innuendo must fall, the complaint may survive if no innuendo was necessary to sustain a cause of action. We followed this rule in *Wuest v. Brooklyn Citizen* (102 App. Div. 480), and I shall abide by it.

I think that the article is well within the words of PAXSON, J., in *Press Company v. Stewart* (119 Penn. St. 584, 603): "The matter

App. Div.]

Second Department, March, 1906.

has been very much magnified and an importance attached to it which it does not deserve. An actionable libel cannot be created out of nothing." Of course the mere fact that the print was a jest does not put the defendant out of peril. Ridicule may ruin a reputation or a business. On the other hand, although there is more or less contempt in the laughter that ridicule excites (Cent. Dict.), it may be merely "sportive or thoughtless," and so as to be distinguished from derision (Stand. Dict.). The contempt here, if any, would naturally arise from the fact that the plaintiff should have fallen a victim to the catch, when the reader could not have been so ensnared, and such kind of contempt would not mar the plaintiff's reputation or his business. In *Triggs v. Sun Printing & Pub. Assn.* (179 N. Y. 144, 155) the court, per MARTIN, J., state the rule: "If, however, they can be regarded as having been published as a jest, then it should be said that however desirable it may be that the readers of and the writers for the public prints shall be amused, it is manifest that neither such readers nor writers should be furnished such amusement at the expense of the reputation or business of another." And the learned judge further says that jest is not justification "unless it is perfectly manifest from the language employed that it could in no respect be regarded as an attack upon the reputation or business of the person to whom it related." It seems to me "perfectly manifest" that the article falls within this exception. As I have said, any fair-minded man would rise from the reading without a thought that the article could be regarded as an attack, actual or covert. He would consider it only as the story of a practical joke that left unimpaired the repute and the affairs of the butt of the pleasantry. It may be that as a result of the publication the plaintiff has received a by-name or a nickname that is not agreeable to him. Such epithets often outrun and outlive their origin. Mr. Odgers, in his *Libel and Slander* (3d ed. p. 124), says: "The fact that actual damage has followed from the publication is immaterial in considering what is the true construction of the libel," citing Lord COLERIDGE, Ch. J., in *Hart v. Wall* (2 C. P. Div. 146). Mr. Newell in his work on *Slander and Libel*, lays down the same rule (2d ed. p. 286). Mere ridicule, not such as is yoked in the various definitions with "hatred, obloquy or contempt," but such as may be sportive and thoughtless, that may beget laughter, that

leaves the temporary victim unaffected in his reputation and his business, is not necessarily libelous. The limitation expressed in *Triggs v. Sun Printing & Pub. Assn.* (*supra*), and the affirmance of *King v. Sun Printing & Pub. Assn.* (84 App. Div. 310; *affd.*, 179 N. Y. 600) thus indicate. While the public press cannot with impunity ruin or affect a man's fair name or his affairs under the guise of joke or jest, on the other hand it need not be debarred from all humor, even of a personal kind that begets laughter and leaves no sting. Otherwise its columns might be almost as dull as the pages of *The Gazette*, or perhaps the courts become frightened at the volume of actions for defamation, as were the English judges of the 16th and 17th centuries, when in desperation they applied the rule of *in mitiori sensu* to the verge of absurdity. (Thay. Ev. 288.)

I advise that the interlocutory judgment be reversed, with costs, and the demurrer be sustained, with costs.

HOOKEE, RICH and MILLER, JJ., concurred.

Interlocutory judgment reversed, with costs, and demurrer sustained, with costs.

---

CHARLES D. WILLIAMS, Respondent, v. WILSON & McNEAL  
COMPANY, Appellant.

Second Department, March 2, 1906.

**Sale — when contract for sale of goods not entire — finding that there was no “delivery” construed.**

When the vendor has named the price of certain goods, and the vendee has ordered some of them, which were delivered but not paid for, and the vendee subsequently orders other goods, which the vendor refuses to deliver without payment, the contract of sale is not entire, and the refusal of the vendor to deliver the last orders does not prevent a recovery for the goods previously delivered. In the absence of a contract giving credit the vendor may require payment on delivery.

A finding by the court that certain goods were ordered but not “delivered” is not equivalent to a finding that the vendor has broken the contract, as such finding may mean only that the vendor refused to turn over the goods, which he had a right to do.

App. Div.]

Second Department, March, 1906.

APPEAL by the defendant, the Wilson & McNeal Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 4th day of April, 1905, upon the decision of the court rendered after a trial at the Kings County Trial Term, a jury having been waived.

*Isaac N. Miller*, for the appellant.

*William B. Hurd, Jr.*, for the respondent.

JENKS, J. :

This action for goods sold and delivered was tried before the court, without a jury, which found for the plaintiff. The plaintiff put prices upon various goods, and thereafter the defendant ordered some of them, which were furnished but not paid for. The defendant contended that certain goods thereafter ordered were not furnished, and the court found that they were not "delivered," although demanded.

The points raised upon this appeal are that there was an entire contract, that nothing was to be paid until its complete performance, and that the finding of the court necessarily led to a judgment upon the counterclaim for damages for the non-delivery. There is no evidence that establishes that there was any entire contract, and the dealings between the parties do not indicate one. There is no proof that any credit was extended, or that there was any agreement that the payment for any goods furnished should be deferred until all goods which might be ordered from time to time were delivered. The general rule is that in the absence of agreement for credit or delay, delivery and payment are each a condition of the other. (*Tipton v. Feitner*, 20 N. Y. 423; *Benj. Sales* [7th Am. ed.], § 677. See, too, *Ming v. Corbin*, 142 N. Y. 334, 340 *et seq.*) If the defendant had proved that the contract was entire, or that under the order for this lot and its acceptance credit was to be extended or payment delayed, or that the plaintiff was to give up the goods to it at its place of business before he was entitled to demand payment, then a different question might have been presented to the court. The learned counsel for the appellant cites *Woolner v. Hill* (93 N. Y. 580), where the court say: "We think it was sufficient that the plaintiffs were ready and willing to pay the contract

price of the alcohol when delivered, and no tender was necessary. This rule is well settled in this State. (*Coonley v. Anderson*, 1 Hill, 519; *Vail v. Rice*, 5 N. Y. 155; *Bronson v. Wiman*, 8 id. 188; *Isaacs v. New York Plaster Works*, 67 id. 124.)” But in that case the stuff was to be delivered at defendant’s vessel, and the court had said immediately before the utterance quoted that the plaintiffs had demanded the delivery offering to pay the purchase price on delivery. In the case at bar the plaintiff answered the demand for delivery by writing: “Give us either \$600.00 on account of the old bill and leave the balance until the dispute is settled or else pay for these goods we have here and let the first bill wait until it is settled complete. We don’t want to give you any larger line of credit than we have already given.” In the absence of any contract as to terms, the plaintiff was free to insist upon such terms as he chose, and consequently to demand payment before he shipped the goods to the defendant. I think that the court did not use the word “delivery” in the sense that the defendant was entitled to the goods, and that the plaintiff thereby broke his contract. Benjamin on Sales (7th Am. ed. pp. 694, 695) says: “There is no branch of the law of sale more confusing to the student than that of delivery. This results from the fact that the word is unfortunately used in very different senses; and unless these different significations are carefully borne in mind, the decisions would furnish no clue to a clear perception of principles. The word ‘delivery’ is sometimes used with reference to the passing of *the property in* the chattel, sometimes to the change of *the possession of* the chattel; in a word, it is used in turn to denote transfer of *title*, or transfer of *possession*.” I think that the expression as used, in view of the disposition of the case, simply meant that the plaintiff never parted with the possession of the goods, *i. e.*, he did not give them over to the defendant although a demand was made upon him. “Ordinarily, and in the absence of an agreement to the contrary, the seller is under no obligation to send or carry to the buyer the goods sold. His duty is fulfilled by so placing them at the disposal of the buyer that they can be removed by him.” (24 Am. & Eng. Ency. of Law [2d ed.], 1068.) Without any proof as to the conditions of this sale, the seller asked payment for the goods which he had “here.” The buyer had theretofore written that it would

App. Div.]

Second Department, March, 1906.

promptly pay any bills when the seller proved the delivery of the goods. There is not the slightest proof that the seller, in insisting upon the terms indicated by him, violated any contract between them, and the mere finding of "non-delivery," for the reasons already indicated, does not inevitably require a conclusion of his breach of contract.

The judgment must be affirmed, with costs.

HOOKEE, GAYNOR, RICH and MILLER, JJ., concurred.

Judgment affirmed, with costs.

---

JENNIE MCGAHIE, Appellant, v. JOHN A. SPROAT, Administrator,  
etc., of BRIDGET T. MCCLENNEN, Deceased, Respondent.

Second Department, March 2, 1906.

**Negligence — verdict not excessive.**

A verdict of \$1,500 for injuries received in a collision, by which plaintiff's arm was broken in three places and which caused internal congestion, etc., is not excessive, and an order requiring the plaintiff to stipulate to reduce such verdict to \$500 will be reversed.

RICH, J., dissented.

APPEAL by the plaintiff, Jennie McGahie, from an order of the Supreme Court, made at the Kings County Trial Term and entered in the office of the clerk of the county of Kings on the 29th day of June, 1904.

*Mitchell May*, for the appellant.

*Francis B. Mullin*, for the respondent.

PER CURIAM:

The action is for negligence. There was a collision between the plaintiff's carriage and that of the defendant's intestate, and as a consequence the plaintiff suffered bodily injuries. The jury rendered a verdict of \$1,500 in her favor. The motion of defendant on the minutes to set aside the verdict and for a new trial on the ground "that the verdict is excessive, against the evidence, and the weight of the evidence, and as unsupported by the evidence, and

contrary to the evidence and the law, and upon the grounds specified in section 999 of the Civil Code\*,” was granted, the verdict vacated and set aside and a new trial ordered unless the plaintiff stipulated within five days to reduce the verdict to \$500, in which case the motion was denied. The learned trial justice filed a memorandum as follows: “This case is a stale and doubtful one, but I have concluded to let the verdict stand if plaintiff stipulates to reduce it to \$500.00.” We naturally conclude from the order, read with the memorandum, that the learned court thought that a verdict for \$500 would be proper. The disposition of the case was a reduction of the verdict. We think that if the damages were not excessive the order should be reversed and the verdict reinstated. The plaintiff complained that her right arm was broken in three places below the elbow; that such injuries were permanent, and that she sustained other bruises about the arm and body, so that she was confined to her home for upwards of four months and suffered severe pain and anguish. It appears from her testimony that she was thrown to the ground, striking her left hip, and that as she raised her arm to protect her face from the hoof of a kicking horse she was kicked in the arm. She was confined three weeks to her bed and was attended by Drs. Rushmore and Corbally. Her arm was broken in three places. It was taken out of the splint, examined and replaced in the splint. She was taken to the hospital and there photographed by X-rays; her arm was then pulled and twisted by the surgeons and put into plaster, and different applications were thereafter made from time to time — a metal splint, a cardboard splint and bandages. She also suffered from affliction of the stomach and liver, which continued at the time of the trial. She was confined to the house for three months and suffered from constant fainting spells. Her arm often pains her when she turns it or attempts to lift a heavy book or the like, and her fingers are stiff. Dr. John D. Rushmore, an eminent surgeon of this city, who was the consultant, found a fracture and a break of both bones of the forearm between the wrist and elbow, and he also corroborated in part the plaintiff’s testimony as to her treatment. Dr. Corbally, the attending physician, testified to the fracture, that she was severely bruised on the arm and legs and on the thigh, and said

---

\* Code Civ. Proc. § 999.— [REP.]



App. Div.]

Second Department, March, 1906.

that he found "an internal disturbance;" that congestion of the abdominal organs was developed; "severe congestion, a severe injury." He testified that he attended her a year or two "for this trouble," which in his opinion was the result of the accident. No medical evidence was offered by the defendant. We think that while the verdict was liberal, it was not so excessive as to justify an interference with a matter which is primarily and peculiarly for the jury.

The order should be reversed, with costs, and the verdict reinstated.

JENKS, HOOKER and MILLER, JJ., concurred; RICH, J., dissented.

Order reversed, with costs, and verdict reinstated, with costs.

LOUISE CURTIN, Respondent, v. JOHN CURTIN, Appellant.

Second Department, March 2, 1906.

**Separation — abandonment — evidence insufficient to show that wife consented thereto.**

In an action for separation brought by a wife on the ground of abandonment, her testimony that she did not now want her husband to come back, that she was satisfied when he left the house, that she would not go back to him, etc., does not show a consent to the abandonment which prevents a decree of separation when the evidence as a whole shows that, when the husband announced his intention to go, she asked him to support her.

The mental state of the plaintiff is not a substitute for her words and acts at the time of the abandonment.

Alimony reduced.

APPEAL by the defendant, John Curtin, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 25th day of January, 1905, upon the decision of the court rendered after a trial at the Kings County Special Term.

*William Victor Goldberg*, for the appellant.

*Rufus O. Catlin* [ *William Wills* with him on the brief ], for the respondent.

JENKS, J.:

This is an appeal from a judgment of limited divorce based upon abandonment. *First*, it is insisted that there was failure of proof in that it did not appear that the going away was without the assent of the plaintiff. Consent is inconsistent with the idea of abandonment or desertion. (*Uhlmann v. Uhlmann*, 17 Abb. N. C. 236, 260; *De Meli v. De Meli*, 67 How. Pr. 20; *Ford v. Ford*, 143 Mass. 577.) The plaintiff testifies that the defendant left their common home on June 30, 1904, and that he has never returned to her. On cross-examination she testifies: "I do not want him to come back, on account of the names he called me. I was satisfied that he left the house; I had peace after he had gone. I asked if he was going away and he said yes; I asked him for a support and he gave me a very sulky answer, not fit to express. He did not tell me that when I quit going around with one Meehan that he would be willing to live with me. It was about the 3d of June that I left his bed. After the 3d I was not asked to come back. I would not go back. After the 3d of June, if he stayed in the house I would stay there too. Q. You would not stay with him at all? A. No, I would not, for the names he called me. Q. You would not stay with him now? A. No, I don't want him." Testimony as to what the witness would or would not do in an event is not evidence as to whether she did or did not consent to his abandonment. (*Ford v. Ford*, *supra*; *Monteath v. Monteath*, 51 Ill. App. 126.) In *Ford's* case the court, passing upon a similar question, say, per HOLMES, J.: "Conduct which in itself is proper cannot be made improper by inquiring what he would have done in an event which did not happen." Of course her mental state would naturally aid the conclusion that she did show consent by words or acts, but such mental state is no substitute for acts or words. (*Ford v. Ford*, *supra*.) When we analyze the testimony of the plaintiff it appears that she but asked the defendant if he was going away, and when he said yes, she asked him for support. I think that this is not sufficient to indicate that the plaintiff consented to desertion or abandonment. Of course the court was not bound to credit the statement of the defendant that he left "by mutual agreement." Moreover, his explanation of the "mutual agreement" seems to be that he expressed his intention to leave, and that his

App. Div.]

Second Department, March, 1906.

wife said nothing. *Second*, the defendant is charged with \$10 a week, and the plaintiff is allowed the use of the dwelling house. The wife testifies that her husband has an income of \$120 a month, that he has received rents from the lower part of the house of \$15 a month, and that he owns lots and a house in Flatbush which return a rental of \$20 a month. The husband, aged sixty-one, testifies that he receives \$30 a week wages; that he bought the house which his wife occupies (they are tenants by the entirety) with his own money; that there is a mortgage on it, and that the rental of the lower part is not sufficient to meet the interest on the mortgage and the taxes, which he pays; that the property in Flatbush is mortgaged for \$1,000, and that the rent pays interest and taxes but not the repairs. The wife is fifty-two years of age, with but one child dependent on her, a lad of twenty years, who earns \$6 a week. She is the life tenant of certain property which pays her \$41 a month. I think under the circumstances that in addition to affording the plaintiff a home, a charge upon his weekly wages of \$7.50 is sufficient, and, therefore, I recommend that the judgment be thus modified, and as modified be affirmed, without costs of this appeal.

HIRSCHBERG, P. J., WOODWARD, RICH and MILLER, JJ., concurred.

Judgment modified in accordance with the opinion of JENKS, J., and as modified affirmed, without costs of this appeal.

---

HARRY MENDOZA, Respondent, v. GEORGE LEVY, Appellant.

Second Department, March 2, 1906.

**Evidence — uncorroborated evidence of plaintiff — when truth thereof question for jury although defendant gives no evidence.**

In an action for money had and received the only evidence of the payment was the uncontradicted testimony of the plaintiff. The defendant gave no evidence. - The plaintiff testified that he gave money to the defendant as a bet on a horse race; that the transaction was three years ago; that he could not tell how defendant looked; that other persons whom he did not produce as witnesses were with him.

APP. DIV.—VOL. CXI. 29

*Held*, that as the plaintiff's testimony was uncorroborated, the question of his payment to the defendant was for the jury and that a direction of a verdict for the plaintiff was error.

APPEAL by the defendant, George Levy, from a judgment of the Municipal Court of the city of New York, borough of Brooklyn, in favor of the plaintiff, entered in the office of the clerk of said court on the 3d day of March, 1905, upon the verdict of a jury rendered by direction of the court.

*John J. Lindsay*, for the appellant.

*Joseph F. Perdue*, for the respondent.

JENKS, J. :

The action is for money had and received. The defendant offered no evidence. The court directed a verdict for the plaintiff, overruling, under exception, the request of the defendant for a submission to the jury. As the case depends upon the uncorroborated testimony of the plaintiff the question on this appeal is whether the general rule as stated in *Saranac & L. P. R. R. Co. v. Arnold* (167 N. Y. 368), or that general rule as modified and expressed in *Hull v. Littauer* (162 id. 569), should obtain in this case. The general rule stated in the first case *supra* is (pp. 373, 374): "The general rule is that where a witness is interested in the question, although he is not impeached or contradicted, his credibility is a question for the jury, and the court is not warranted in directing a verdict upon his testimony alone. (*Gildersleeve v. Landon*, 73 N. Y. 609; *Kavanagh v. Wilson*, 70 N. Y. 177; *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549; 29 Amer. & Eng. Encyclo. of Law [1st ed.], 774.) The same rule applies to the testimony of two witnesses, both equally interested and testifying to the same facts." The general rule, as modified in the second case *supra*, is (p. 572): "Generally, the credibility of a witness, who is a party to the action, and, therefore, interested in its result, is for the jury; but this rule, being founded in reason, is not an absolute and inflexible one. \* \* \* Where, however, the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to

App. Div.]

Second Department, March, 1906.

the probabilities, nor, in its nature, surprising or suspicious, there is no reason for denying to it conclusiveness."

We think that the rule of *Saranac & L. P. R. R. Co. v. Arnold* (*supra*) applies. The plaintiff testified that he went to a race track and made five bets on a horse named Clorita with different individuals, who were making bets in an inclosure. He testified that this defendant accepted his wager at certain odds, and called it out to another person who was writing near by, together with the number of the entrance badge or ticket worn by the plaintiff. On cross-examination he testified that he never made a bet with Oliver Smith on that day, and that he never included Smith in his original complaint. Yet he was confronted with a complaint of such a character. He explains this variance by testifying that he trusted to his former attorneys. He also states that he never knew Smith until he saw him in Judge Martin's court. He testifies that he made a verified complaint against the said Smith and Rose in another action upon another bet because his counsel had told him that Rose and Smith were connected. The transaction he testifies to occurred three years before. He testifies that two others were with him at the time, and yet he does not account for the absence of one of his said companions. He could not recollect "what sort of a looking man was this defendant." He doubted whether he would know him if he saw him. We think that the court could not say that the defendant was not entitled to have the jury pass upon this testimony in that it was not open to examination on the ground of its truth, or its accuracy, or that there was no ground for suspicion that justified its scrutiny. At the same time we are far from saying that it would not support a verdict for the plaintiff.

The judgment must be reversed and a new trial ordered, costs to abide the event.

HIRSCHBERG, P. J., HOOKER, RICH and MILLER, JJ., concurred.

Judgment of the Municipal Court reversed and new trial ordered, costs to abide the event.

EDWARD MANN and Others, Infants under the Age of Fourteen Years, by ARTHUR D. LAWRENCE, as Their Guardian ad Litem, Respondents, v. GEORGE G. SHRIVE, Appellant.

Second Department, March 2, 1906.

**Gift—when gift of savings bank deposit is in trust to pay over to beneficiaries.**

A colored servant, dying at the house of her employer, executed and acknowledged an instrument directed to a savings bank where she had a deposit, requesting the bank to add the name of her employer to her book "without any restrictions," in order that he might "be able to use and pay out the money," etc. At the same time she delivered the bank book to the defendant, her employer. Several witnesses testified that the defendant admitted that the transaction was made for the benefit of some colored children, godchildren of the donor, and that he had accepted the same in trust for them. It was shown that the donor had often said that she wanted the money to go to said children. In the light of the whole situation as specifically set forth in the opinion,

*Held*, that the gift was in trust for the benefit of said children, and that the defendant should pay over the moneys, less the legitimate funeral expenses; That the trust was not continuing in its nature, but for the sole purpose of paying over to the beneficiaries.

APPEAL by the defendant, George G. Shrive, from an interlocutory judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Westchester on the 21st day of January, 1905, upon the decision of the court rendered after a trial at the Westchester Special Term.

*George S. Hamlin*, for the appellant.

*Arthur J. Burns*, for the respondents.

JENKS, J.:

During her last illness from a chronic disease, Sarah Baker executed, acknowledged and delivered this writing to the defendant:

"YONKERS, N. Y., Feb. 8, 1904.

"YONKERS SAVINGS BANK,

"Yonkers, N. Y.:

"GENTLEMEN.—I am confined to my bed and too ill to come to the Bank. In order that Mr. George G. Shrive may be able to use

App. Div.]

Second Department, March, 1906.

and pay out the money I now have or may in the future have on deposit with you, I hereby request you to add his name to my book without any restrictions.

"Yours respectfully,

<sup>her</sup>  
"SARAH J. X BAKER."

mark

The attorney who took the acknowledgment showed her the bank book with this assignment written in it, and said, "this transfers all your money to Mr. George (the defendant's first name), is that what you wish to do?" and she answered "yes." At that time she delivered the bank book to the defendant. Upon this evidence alone the effect of the transaction was at least to vest in the defendant a joint ownership in the fund, who, if the survivor, would be entitled to it all. (*Farrelly v. Emigrant Industrial Savings Bank*, 92 App. Div. 529, 531, and authorities cited.) But in *Taylor v. Kelly* (5 Hun, 115) it was held: "To constitute a gift a manual delivery of the thing given is not necessary. A delivery to a third person as trustee or bailee of the donee is sufficient to pass the title, and the donor may, by an apt declaration to that effect, convert himself into a trustee for the donee." (See, too, *Phipard v. Phipard*, 55 Hun, 436; *Holliday v. Lewis*, 14 id. 480.) Therefore, a question is presented whether such delivery was to the defendant for his benefit, or as bailee or trustee for the infant plaintiffs. The Special Term has found that the defendant received and accepted the gift for their benefit, and although the point is made that proof which depends upon admissions is sharply scrutinized and that evidence to sustain such a finding must be clear and convincing, yet I think that we would not be warranted to disturb this finding upon the facts, within the rule laid down in *Lowery v. Erskine* (113 N. Y. 52); *Foster v. Bookwalter* (152 id. 166); *Parfitt v. Ferguson* (3 App. Div. 176), and *City of New York v. Herdjs* (68 id. 370). The testimony of Dr. Trotter, the physician of Sarah, is that several days before her death the defendant said to him that she had no relatives; if she died intestate her money would revert to the State; the Mann children would not get it, and her intention had been that they should receive it. A day or two thereafter he told the

witness that Mr. Thayer (an attorney) had been there and they "had fixed it all right; \* \* \* she had signed a paper and had the thing legally fixed for the benefit of the Mann children." On cross-examination the witness testifies that the defendant said Mr. Thayer had been "there and the thing was all fixed satisfactory," but he was not positive that he mentioned the Mann children; he did not, but "that was understood." Edward Mann, the father of the children, testifies that after the funeral the defendant told him that Judge Thayer had been to the house, and through him he had secured the money to the children of the witness; that the day after the defendant said he had changed his mind about the effects—that Mrs. Mann must not come after them; that he was going to hold them, but that the money was in trust for the children. Later the defendant said the matter was in the surrogate's hands. Mrs. Mann testifies that the defendant talked to her in the presence of his wife. He then said that Sarah had told him that she wanted the money for the three children in his trust, but "she didn't have but about \$500, but she must have been very liberal with her friends." He said that he had accepted the money, and was going to hold it in trust for the benefit of the children and through Judge Thayer had obtained it for her children. A few days after the funeral, when she asked if he was "going to come up to his word," he took a paper from his desk, showed it to her and said, "everything is to the Surrogate, I have nothing to do with it." On the other hand, the defendant denies that he ever told the Manns that Sarah had left her property otherwise than to him or that he had ever admitted to any one that he held the money in trust. He does admit that he said to Dr. Trotter before the paper was executed that it seemed too bad that Sarah could not make her will, and that as it looked now, unless something was done he would have to pay the funeral expenses, that the Mann children would not get anything, but that the property would go to the State. He testifies that he told Dr. Trotter that it had been satisfactorily arranged, that Judge Thayer had come down and that it had been transferred to him, but that he said nothing about the trust. He admits that he did "say something" to Mr. Mann "about advancing something to the children, or helping them in some way," and that he understood that "at times" Sarah had wanted to give something to the



App. Div.]

Second Department, March, 1906.

children or to the church, but finally she desired to give it all to him. The mother of the defendant testifies that Sarah, nearing her end, said she wanted to leave her money to her two boys and nothing to the Manns or to any other person. Dr. Trotter, recalled, testifies that at the second conversation the defendant did not say anything to the effect that Sarah had given him the money absolutely. Mr. Broughall testifies that the defendant said that Mr. Mann said that defendant owed him (Mr. Mann) money, that whatever Sarah had left would go to her relatives and that he had sought them down south, as he thought they needed it more than the Manns, and if Mann had said nothing, Mann could have had a "few hundred dollars." While this is all of the evidence that bears directly on the transaction, other circumstances lighten it up. (*Minchin v. Merrill*, 2 Edw. Ch. 333, 338.) Sarah was an old colored spinster who had been a domestic servant in several families. She had no relatives. The Mann family were of her color, and in apparently the same station in life. When out of service or ill she made her home with them as one of the family without charge, and was nursed by them in her illnesses. She was the godmother of the three children, and called them her children. She had repeatedly declared, even to her physician, if she left anything she wished it to go to them. A few months prior to her death she had attempted to insure her life for the children, declaring that she was their godmother, that she had no relatives, and she considered it her duty to provide something for them. This declaration was made to the insurance agent in the presence of the defendant. She had told the children that at her death all would go to them. On the other hand the defendant was far above her, and apparently in good circumstances. She had once lived in his family for many years as a servant, but had gone elsewhere and had only returned to his service for eight months before she died. There was no unbroken relation of continuous service through which a menial almost merges into a member of the family. On the other hand, she was dying while a servant in his house; it was but natural that an illiterate woman should intrust her money to him as her almoner, and should turn to him to carry out her wishes. While the transaction in its entirety is sufficient to establish a gift, the terms of the written transfer to the defendant are to "use and pay out," which contemplate a disbursement by the recipient rather

than an absolute gift to him. Inasmuch as a lawyer was called in nothing could have been easier than to employ apt words that would have settled the terms of the transfer beyond all cavil. There are two significant matters in the defendant's case. Mrs. Mann testifies that the declarations of the defendant were made in the presence of the defendant's wife. That lady was not called as a witness, although there was a continuance of the case, and no explanation of her absence appears. The whole amount of the deposit was \$972. On February tenth, the day before Sarah's death, the defendant drew out \$400, and during the time intervening the twenty-fourth of that month and the ensuing April second, he drew out the whole deposit. The defendant testifies that the funeral cost \$300, and that the casket cost \$165. He thereafter denied the correctness of the undertaker's bill when it appeared therefrom that the casket cost \$84, but later on, when the undertaker showed that the cost was \$84 and the funeral expenses were \$165.50, it was admitted that the bill was correct. The mother of the defendant is directly contradicted by Mary Brown, who testifies that the lady said to her that Sarah said when she died she would leave the Mann children something. So far, then, as the Special Term finds that the transfer of the fund to the defendant was for the benefit of these infant children, I think that its determination must be affirmed. And such an undertaking on the part of the defendant can be sustained. In *Rutgers v. Lucet* (2 Johns. Cas. 92) the court say (p. 95): "A mere agreement to undertake a trust, *in futuro*, without compensation, it is true, is not obligatory; but when once *undertaken*, and the trust actually *entered upon*, the bailee is bound to perform it, according to the terms of his agreement. The confidence placed in him, and his undertaking to execute the trust, raise a sufficient consideration; a contrary doctrine would tend to injure and deceive his employer, who might be unwilling to consent to the bailment on any other terms." (See, too, *McKee v. Lamon*, 159 U. S. 317, 322; Story Eq. Juris. [13th ed.] §§ 1041, 1046.) I think that the transaction must be regarded as a gift of the fund, or so much thereof as might remain after the payment of any proper charges against it for the benefit or on account of Sarah Baker. Any payments which constituted a proper charge against it — for she left nothing else save a few personal effects — cannot, despite their payment therefrom, be

App. Div.]

Second Department, March, 1906.

charged against the defendant in order to make whole the amount of the fund at the time of the transfer. The physician's services, the funeral expenses, or any other proper and necessary outlay of like kind, could be discharged from the fund. But as to the residue, he must account to the infants or to their representatives. I do not think that there was a trust created in the sense that the defendant was to hold the money for the benefit of these infants for any period of time, but that the plain intent of Sarah was to afford a payment to them, or, as they are infants, to their representatives for their benefit.

The judgment should be modified in accord with this opinion, and as modified affirmed, without costs.

HIRSCHBERG, P. J., WOODWARD, RICH and MILLER, JJ., concurred.

Judgment modified in accordance with the opinion of JENKS, J., and as modified affirmed, without costs. Order to be settled before Mr Justice JENKS.

---

OTTO LINDWALL, Appellant, v. JOSEPH M. MAY and Others,  
Respondents.

Second Department, March 2, 1906.

**Landlord and tenant — eviction by failure of lessor to keep building safe — when damages recoverable for breach of covenant for quiet enjoyment.**

A tenant, holding under a lease with covenant for quiet enjoyment, is entitled to go to the jury in an action for damages for eviction upon evidence showing that the premises, which were undermined by adjoining excavations and were torn down as unsafe, could have been kept safe by proper care on the part of the lessors. Evidence that the lessors were directed, pursuant to the Municipal Building Code, to make the premises safe shows an obligation cast upon the lessors by ordinance, and if the building was torn down as a nuisance owing to their default, such nuisance was attributable to them.

APPEAL by the plaintiff, Otto Lindwall, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Kings on the 25th day of November, 1903, upon the dismissal of the complaint by direction of the court after a trial at the Kings County Trial Term.

*Robert Stewart* [ *V. L. Haines* with him on the brief ], for the appellant.

*Hugo Hirsch*, for the respondents.

JENKS, J. :

This is an action for damages by lessee against lessors, based upon an eviction in violation of an express covenant in the lease for quiet enjoyment. During the term third parties as owners of adjacent land made excavations thereon for rebuilding, and the building demised became unsafe, part fell, and the structure very soon was destroyed for the public safety by or under the orders of the city authorities.

The plaintiff was dismissed at the close of his case, not for failure of proof, but expressly upon an authority that I think was not controlling. If the plaintiff could show that a destruction of the building would not have been required if the lessors had discharged an obligation cast upon them, and but for such destruction the building would have remained tenantable by the lessee, then I think that the dismissal was error. Taylor on Landlord and Tenant (9th ed. § 309a) says: "Whatever may have been the doctrine of the ancient law, actual ouster or physical dispossession is not now necessary to constitute a breach of the covenant for quiet enjoyment. The prevailing doctrine now is, that after a demand or other hostile assertion of the paramount title the lessee may yield thereto, taking the risk of its being the superior title, and his attornment or purchase, without any actual change of possession, will be a constructive eviction and breach of the covenant. So an act which disturbs the lessee's possession, if necessary, although done ostensibly under the direction of the law, may amount to an eviction. Thus if the lessor of a room in a building in a city, having notice from the inspector of buildings in that city that the building is deemed by him unsafe, takes down the building, unnecessarily, when he might cause it to be made safe, as authorized by the statute to do, without taking it down or disturbing the lessor's possession; this is a breach of the covenant. In such a case, it will be a question of fact whether the taking down of the building was necessary." (See, too, *Kansas Investment Co. v. Carter*, 160 Mass. 421; also cited in 1 McAdam Landl. & Ten. [3d ed.] 409.) There is evidence, not strong, not definite, but sufficient to have saved the nonsuit. The jury might have found that the lessors were apprised of the danger. Section 22 of the Building Code, read in evidence, required them as owners to preserve wall or walls,

App. Div.]

Second Department, March, 1906.

structure or structures from injury, and so support them that they should be and remain practically as safe as before such excavation was commenced, and permitted entry upon the premises where the excavation was made when necessary. The original direction to the lessors under the ordinance was to make the premises safe and secure. It was not conclusively shown that it was impossible for the defendants to have saved the premises from destruction by fulfilling the duty cast upon them by the ordinance.

Again, if the building became a public nuisance through the omission of the lessors to preserve and support it properly, as required by the ordinance, if they could have done so, after they had received due notice, such nuisance was attributable to them. (*Ahern v. Steele*, 115 N. Y. 203, 209.) If the paramount duty of its abatement involved the eviction of the lessee, I do not see why the reasoning of the rule in *Steefel v. Rothschild* (179 N. Y. 273, 279 *et seq.*) does not apply. I do not overlook the principle laid down in *Steefel v. Rothschild* (*supra*), and more particularly in *Connor v. Bernheimer* (6 Daly, 295), *Kramer v. Cook* (7 Gray, 550), *Sherwood v. Seaman* (2 Bosw. 127) and *Howard v. Doolittle* (3 Duer, 464); but it seems to me that this case is different in that the destruction of the premises and consequently the eviction may have been unnecessary if the lessors had properly fulfilled the obligation cast upon them by the ordinance.

It is quite true, as was said in *Burke v. Tindale* (12 Misc. Rep. 31, 32; *affd.*, 155 N. Y. 673): "The contingency of the exercise by the city authorities of the power to remove it must have been contemplated by both parties, and has not been guarded against by any provision of the lease," but the contingency of the exercise of such power *consequent upon the non-fulfillment by the lessors of their obligation under the ordinance*, was not contemplated.

I recommend that the judgment be reversed and a new trial granted, costs to abide the event.

HIRSCHBERG, P. J., HOOKER, RICH and MILLER, JJ., concurred.

Judgment reversed and new trial granted, costs to abide the event.

In the Matter of the Judicial Settlement of the Account of CHARLES HURST, as Administrator, etc., of EMMA A. HURST, Deceased, Respondent.

MARY KNAPP, Legatee, Appellant.

Second Department, March 2, 1906.

**Executors and administrators — when administrator who is superseded by an executor is entitled to commissions — amount of such commissions.**

A permanent administrator appointed before the discovery of a will, and acting in good faith, is entitled to commissions on being superseded by an executor thereafter appointed.

*It seems*, that it is only when an administrator resigns that he loses his right to commissions.

But full commissions are to be allowed only on moneys collected and disbursed.

He is only entitled to partial commissions for collecting without disbursing.

Paying over to the executor is not disbursing the fund.

Neither are moneys left in the savings bank as originally deposited by the deceased "collected" by such administrator so as to entitle him to commissions thereon.

Such superseded permanent administrator is not like a temporary administrator entitled to full commissions.

APPEAL by Mary Knapp, legatee, from so much of a decree of the Surrogate's Court of the county of Kings, entered in said Surrogate's Court on the 21st day of December, 1904, settling the accounts of the administrator of the estate of Emma A. Hurst, deceased, as allows commissions to said administrator, and also from an order bearing date the 30th day of January, 1905, and entered in said Surrogate's Court, denying the appellant's motion to vacate the said decree and to strike out said allowance of commissions.

*Francis B. Mullin*, for the appellant.

*Charles H. Payne*, for the respondent.

JENKS, J.:

The sole ground of appeal is the allowance of commissions to an administrator appointed in case of supposed intestacy, who accounts to the executor under a will subsequently produced and probated.

App. Div.]

Second Department, March, 1906.

The decedent was killed by an accident in July, 1904, the letters were issued the following August, and the will was probated in the next November. The probate thereof revoked the letters (Code Civ. Proc. § 2684) and the administrator thereupon was ordered to account and to turn over the estate to the executor. The surrogate found that the administrator collected, received and took possession of the estate, consisting of cash, securities and sundry chattels of the aggregate value of \$37,086.33, and he thereupon allowed full commissions upon that amount. A legatee, objecting, filed exceptions to such findings and the conclusion of law that awarded such commissions, and after the decree moved without success for an order to correct the decree in that respect. The appeal is from the decree and the said order.

The opposition of the legatee is not based upon any alleged fault of the administration, but upon the illegality of the award. This court may examine the case upon facts and law and determine for itself whether upon the facts the decision was right. (*Matter of Rogers*, 10 App. Div. 593, and cases cited.)

I think that the point that commissions could not be allowed for the reason that the case presents a mere succession of administrator by executor cannot prevail in this case. The several cases cited by the learned counsel for the appellant, save one where the representative became demented, show resignations, and they were decided upon the principle declared by the vice-chancellor in *Matter of Jones* (4 Sandf. Ch. 616), that declination of duties once undertaken should not entail loss or expense upon the estate. And it was pointed out in some of the cases that were not this principle followed, then a series of resignations and successors might deplete the estate by as many commissions. But in the case at bar the administrator did not lay down his trust; he was divested of it perforce of the probate of the will. There is not a suggestion that he ever knew of the will until some months after his receipt of the letters of administration. He was the husband of the decedent, and with her at the time she was killed. The will was produced by the sister of his wife, and it does not appear that he is benefited by it. The record indicates that there is little or no sympathy between them, and indeed the sister is the objecting legatee. There is no reason to doubt that the administrator acted in entire good

faith. His administration was not a nullity, but was with authority until the will was probated. (*Kittredge v. Folsom*, 8 N. H. 98; *Executor of O. Bigelow v. Adm's. of E. Bigelow*, 4 Ohio, 138; Schouler Exrs. [3d ed.] § 160.) In 11 American and English Encyclopædia of Law (2d ed. p. 1287) it is written: "The fact that the authority of an executor has been terminated by the revocation of his letters or of the probate of the will does not affect his right to compensation for services previously rendered while acting in good faith." The principle is stated by MARSHALL, Ch. J., in *Wood's Adm'r. v. Nelson's Ex'r.* (10 B. Mon. [Ky.] 231), as follows: "So far as he collected and disbursed the fund for the benefit of the estate and in a manner available to it, his services were as beneficial as those of a rightful executor would have been and he is entitled to the usual compensation." The record in this case shows that the administrator collected \$125 interest on a mortgage. I think that he is entitled to have commissions upon that sum. In *McAlpine v. Potter* (126 N. Y. 285, 290) and *Matter of Mason* (98 id. 527, 536) such a division is approved. He is not entitled to full commissions on this sum for the reason that he has not paid it out within the meaning of the statute, for he has but transferred it to a representative in succession.

I am of opinion that he is not entitled to any further commissions in that he has not received or received and paid out any other sums of money within the purview of section 2730 of the Code of Civil Procedure. "Sums received and paid out are made the basis of computation." (FINCH, J., in *Phoenix v. Livingston*, 101 N. Y. 456.) The bulk of the estate consists of deposits in various savings banks and of bonds and mortgages. The evidence is beyond question that the deposits remained undisturbed and the securities untouched. Indeed the administrator frankly admits that the only cash he ever had in his hands was the said \$125, collected as interest on a mortgage. The relation between the decedent and her depositary, the savings bank, was that of debtor and creditor. (*Fowler v. Bowery Savings Bank*, 113 N. Y. 450.) While the administrator was entitled to receive the payment of the deposit (Id.), and so to collect the debt, he did not, nor does it appear that he even transferred the account, so that there is no room for contention that there was a technical collection and a redeposit in his



App. Div.]

Second Department, March, 1906.

representative capacity. I think that such deposits are not within the purview of the statutory expression, sums of money received. It is true that the term "moneys," as used in bequests and elsewhere, in the absence of qualifying or limiting expressions, has been held broad enough to include deposits in banks. In *Mann v. Executors of Mann* (1 Johns. Ch. 231) Chancellor KENT, in construing a will, said that "perhaps it would be proper to extend the term to money deposited in bank." See, too, *Beck v. McGillis* (9 Barb. 59), where the term "moneys" was held to embrace cash ("using the term in its popular sense") which the testator had on deposit in bank. I may add, however, that there is a distinction drawn between deposits in a bank and in a savings bank. In *Beatty's Exr. v. Lalor* (15 N. J. Eq. 108) the chancellor says (pp. 110, 111): "The first clause will include the cash in the house, whether in specie or notes, the gold in the trunk at bank, and the deposit in bank. It will not include the money in the savings fund; that is in the nature of an investment drawing interest, and is not usually subject to the immediate order of the owner, like money deposited at bank, but can only be called in, like other investments, upon notice." This distinction eliminates as to such deposits the feature that induced the chancellor to say "perhaps" the term "moneys" applied to bank deposits, for he says in *Mann's Case* (*supra*), "for that is cash, and considered and used as cash placed there for safe keeping, in preference to the chest of the owner." There is a manifest difference between the construction of a term of bequest and a statutory term that can be satisfied without its application to cash put out with a savings bank. Even if the term "money" used in this statute were generic enough to include such deposits, certainly for the reasons stated they cannot be regarded as "money received." The right to receive a due that is secure is not the receipt thereof. I am of opinion that these deposits were not the basis for commission.

The securities cannot be regarded as money within the purview of this statute. (*McAlpine v. Potter*, *supra*.)

It is true that the decree permits the administrator to turn over the securities *in specie*, but this does not make them a basis for commission within the doctrine of *McAlpine v. Potter* (*supra*) that in such case they may be regarded as cash accepted by the legatee. This decree is not for the legatee, but for the executor who

steps into the shoes of the administrator perforce of the probate of the will. He takes "the unqualified legal title of all personalty not specifically bequeathed, and a qualified legal title to that which is so bequeathed." (*Blood v. Kane*, 130 N. Y. 514.) I think that mere omission of a legatee to object to a decree that transfers securities in specie from this administrator to the executor is not equivalent to her acceptance of the securities as cash. There is no payment or distribution to the legatee. The learned counsel for the respondent insists that the position of this administrator is analogous to that of a temporary administrator, and that he should receive these commissions because a temporary administrator is entitled to commissions, not only upon actual cash passing through his hands, but upon the value of the property that he cares for and turns over to his successor. I do not agree to the analogy. This administrator was appointed, qualified and served as a permanent administrator. The fact that his tenure was temporary in that it was cut off by the probate of the will cannot affect the character of his representative capacity. There is a well-recognized distinction between a temporary administrator and the permanent administrator. (See *Jessup Surr. Pr.* [2d ed.] 644; *Code Civ. Proc.* § 2670.) And the distinction between the commissions that may be awarded to one or the other is based upon the difference of their functions. (*Jessup, supra*, 1485, and authorities cited.)

The order is reversed, without costs. The decree is reversed so far as it relates to commissions, without costs of this appeal to either party, and proceedings remitted to the Surrogate's Court of Kings county to be disposed of in accord with this opinion.

HOOKE, GAYNOR and RICH, JJ., concurred; GAYNOR, J., however, thinks that the fixing of the commissions should be left to the surrogate without any opinion from this court; MILLER, J., dissented.

Decree of the Surrogate's Court of Kings county reversed so far as it relates to commissions, without costs of this appeal to either party, and proceedings remitted to the Surrogate's Court of Kings county to be disposed of in accordance with opinion of JENKS, J.

ARTHUR MACDONALD, Appellant, v. SUN PRINTING AND PUBLISHING ASSOCIATION, Respondent. (No. 2.)

Second Department, March 16, 1906.

**Libel**—publication calling scientist a "humbug" and "pseudo-scientist."

A publication stating of a scientist that he is a "patho-social humbug" and a "pseudo-scientist" is calculated to injure such person in his calling, and is libelous *per se*. A complaint in an action for libel thereon is not demurrable.

**APPEAL** by the plaintiff, Arthur MacDonald, from an interlocutory judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk in the county of Kings on the 15th day of July, 1904, upon the decision of the court, rendered after a trial at the Kings County Special Term, sustaining a demurrer that the complaint does not state facts sufficient to constitute a cause of action.

The action is for a libel in the publication by the defendant of the following:

"CONGRESS AND THE PATHO-SOCIAL HUMBUG.

"*To the Editor of the New York Sun*—*Sir*: I was very much pleased to see your vigorous and healthy editorial in the *Sun* of Feb. 18, exposing the patho-social humbug and 'specialist in education,' Arthur MacDonald. There is indeed cause for wonderment that his filthy nonsense should have been tolerated for so long a period. As an apostle of Lombrosian doctrines he has the distinction of being, perhaps, both the shallowest and cheekiest American promulgator of the half truths and whole falsehoods, the fallacies and follies, of this Italian School of Degeneracy. 'Doctor' Arthur MacDonald is never so happy as when he can delve in the mire and mud of derelict humanity, but for the bystanders, this 'horrible example' for one, is not a useful or instructive exhibit. That any committees of Congress should fail to appreciate the nauseous character of this individual's 'work' is to be deplored by decent people, and the writer sincerely hopes that *The Sun* will continue fearlessly to expose this persistent self-advertiser and *pseudo-scientist*.

"NEW YORK, Feb. 19.

ANTHROPOS."

*Wales F. Severance*, for the appellant.

*Franklin Bartlett*, for the respondent.

JENKS, J.:

The plaintiff alleges that he was graduated from the University of Rochester and from the Union Theological Seminary, and that thereafter, in this country and in Europe, he was a university student of medical subjects, especially of a medico-legal and criminological nature; that he served the government at Washington as a clerk under the title "Specialist in Education as a Preventive of Pauperism and Crime." He further alleges that he was widely and favorably known here, in Canada and in Europe, both as a student of criminology and a writer of various publications on that and kindred subjects. He complains that the defendant had printed certain articles relating to his vocation, work and writings, which were followed by the publication of the letter upon which his action is brought.

The word "humbug" has become accepted as good English, and has an approved and well-understood meaning as impostor, deceiver, cheat. (Cent. Dict., Worcester's Dict., Standard Dict., Stormonth's Dict., Imperial Dict., March's Thesaurus.) Writers of pure and elegant English, like Lowell and Whipple, use it without the apology of quotation marks or of italics. In *Nolte v. Herter* (65 Ill. App. 430) the appellant used the word "humbug" in conversation, and the court say: "Humbug is an imposition, imposture, deception; and as a verb, signifies to impose upon, to cozen, to swindle, all implying intention to misrepresent, by the assertion of what is not the actual condition or the suppression or concealment of what is."

"Pseudo" is derived from the Greek "pseudein," to cheat, to deceive, and is defined as "a quasi-prefix, in compounds of Greek origin, meaning 'false,' 'counterfeit,' 'spurious,' 'sham.'" It is freely used as an English prefix, with words of any origin. (Cent. Dict.) Stormonth, a most accurate lexicographer, derives it from the Greek "psendes," lying, false; and defines it as "a word frequently prefixed to another and meaning 'false, spurious.'" I think that the letter brands the plaintiff as an impostor, and as a false or sham scientist, and that, therefore, it is a libel upon its face. In *Smith v. Stewart* (41 Minn. 7) the words held libelous *per se* were "irresponsible, unadulterated first class humbug and fraud." In

App. Div.]

Second Department, March, 1906.

*Meas v. Johnson* (185 Penn. St. 12) the words were: "You are a first class fraud and of the first water." In *Commonwealth v. Clap* (4 Mass. 163) the term was "liar, scoundrel, cheat and swindler." The books contain many other cases where equipollent words were pronounced libelous *per se*. I think it clear that the letter passed beyond any legitimate criticism of the work of the plaintiff to stamp him personally as an impostor, and that it cannot be held as a matter of law that the plaintiff pleads no cause of action therefor. (*Triggs v. Sun Printing & Pub. Assn.*, 179 N. Y. 144, 154; *Whistler v. Ruskin* [*Times* for Nov. 27, 1878], cited in *Odgers Lib. & Sland.* [3d ed.] 35.) The words had "a tendency to hurt or are calculated to prejudice" the plaintiff in his calling, and are actionable *per se*. (*Moore v. Francis*, 121 N. Y. 199.)

In the view I take of this demurrer it is not necessary to pass upon the point whether special damages are well pleaded. For the plaintiff was not bound to plead them at all. (*Moore v. Francis*, *supra*, 204; *Baylies Code Pl. & Pr.* [2d ed.] 239, 240, and authorities cited.) When pleaded it seems that the rule is the same as in an action for slander. (*Newell Sland. & Lib.* [2d ed.] 868.)

The interlocutory judgment is reversed, with costs, and the demurrer overruled, with costs, with leave to the defendant to plead over within twenty days.

HOOKE, GAYNOR, RICH and MILLER, JJ., concurred.

Interlocutory judgment reversed, with costs, and demurrer overruled, with costs, with leave to the defendant to plead over within twenty days upon payment.

---

ARTHUR MACDONALD, Appellant, v. SUN PRINTING AND PUBLISHING ASSOCIATION, Respondent. (No. 3.)

Second Department, March 18, 1906.

**Libel — article insinuating lewd motives to scientist — complaint based on such article, when not demurrable.**

A published article, which insinuates that a scientist, in preferring to take physical measurements of the persons of girls rather than boys, and particularly girls over sixteen years of age, was actuated by indecent and lewd motives, may be libelous, and it is error to sustain a demurrer to a complaint on such publication. The question of the libelous character of such publication is for the jury.

APPEAL by the plaintiff, Arthur MacDonald, from an interlocutory judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 15th day of July, 1905, upon the decision of the court, rendered after a trial at the Kings County Special Term, sustaining a demurrer that the complaint in an action for libel does not state facts sufficient to constitute a cause of action.

The article complained of, as published by the defendant in its newspaper, reads :

“THE ABNORMAL ‘DOCTOR.’

“Ejected from the Bureau of Education, ‘Doctor’ Arthur MacDonald, the patho-social investigator, is pestering Senators and Representatives with the request that he be enacted into the Department of Justice, and provided with a laboratory there for ‘the study of the abnormal classes’ under the supervision of the Attorney General.

“How eagerly the Department of Justice yearns for the presence and assistance of this patho-social investigator of abnormal femininity may be inferred from a letter written last Saturday by Attorney General Knox to the Secretary of the Charity Organization Society of this City :

“‘DEPARTMENT OF JUSTICE,

“‘WASHINGTON, D. C., *Feb.* 21, 1903.

“‘SIR.—Replying to your letter of the 18th inst. in which you ask whether this Department has any connection with the bill now pending in Congress, to establish a laboratory for the study of the criminal, pauper and defective classes, I have to say that this Department is not a party in any way to the proposed legislation.

“‘Respectfully,

“‘P. C. KNOX,

“‘*Attorney-General.*’

“The Department of Justice repudiates ‘Doctor’ Arthur MacDonald, his Abnormal Laboratory Bill, and the patho-social humbug. This is merely what might be expected of any administrative establishment where sanity and clean habits of thought prevail.

“That there should be need now of warning Congress against such a measure as Senate Bill 6,032 is a circumstance essentially grotesque to any one who knows the facts about ‘Doctor’ MacDonald

and his 'work.' Yet the bill has actually been reported by the Senate Committee on the Judiciary and is now on the calendar; and it is only about three weeks since the chairman of that Committee, the venerable Senator from Massachusetts, in asking for its immediate consideration and passage, referred to this 'Doctor' MacDonald as 'the very earnest and devoted gentleman who has been engaged in that work formerly in the Bureau of Education.'

"We have already inspected some characteristic specimens of 'Doctor' MacDonald's methods of study. We have seen how he carried his enthusiasm for the investigation of abnormal femininity to the extent of entrapping young girls and foolish married women by means of a personal advertisement, leading them on to the disclosure of their most intimate affairs of the heart or of sexual propensity, sometimes by letter to him and sometimes at a personal interview which he arranged, and then publishing their confidences in a book advertised by him for sale at fifty cents a copy through a lock box in the Washington Post Office. Any Senator or Representative who wants to know just what sort of a person this 'very earnest and devoted gentleman' really is, and how far the impulse of his pursuits is genuinely scientific, may procure from the library of Congress 'Doctor' MacDonald's notorious treatise on 'Girls Who Answer Personals.'

"Since then the 'Doctor' — he is not a Doctor of Medicine, of Law, of Philosophy or of Divinity — has turned himself loose upon the helpless schoolboys and school maidens of the Washington Public Schools. He has measured and tested the boys and girls to the extent to which he was permitted to go. His professed purpose was to obtain with his tape or his testing machines data for scientific generalizations concerning the relation between the physical conformation and moral or intellectual character. He has published statistics and conclusions. The conclusions are the laughing stock of competent scientific authority, but the statistics do really suggest thought, in one particular at least.

"For example, after consulting 'Doctor' MacDonald's 'Girls Who Answer Personals,' let the Congressman who desires to vote intelligently and properly on Senate Bill 6,032 procure a copy of his 'Experimental Study of Children, Including Anthropometrical and Psycho-Physical Measurement of Washington School Children.'

This was published at the expense of the Government as a public document. Amid its worthless conclusions and heterogenous statistics the one fact that stands forth conspicuously is the propensity of the 'Doctor' to exercise his anthropometric energy and psycho-physical curiosity upon girls rather than boys, and especially upon girls of sixteen or over, rather than upon boys of sixteen or over.

"In a partly similar investigation conducted several years ago by a real Doctor of Medicine, Dr. H. P. Bowditch, for the Boston Board of Health, the number of children measured and examined was 24,626, of whom 13,722 were boys, while only 10,904 were girls.

"'Doctor' MacDonald was more interested in the cases of the girls than in the cases of the boys, in the proportion of 8,520 girls to 7,953 boys; and the increase of his interest as the age of the girls increased is shown very significantly and somewhat unpleasantly in these tables summarizing the results of his activity in the matter of 'psycho-physical' measurements:

Boys Examined.		Girls Examined.	
Age.	Number.	Age.	Number.
6.....	147	6.....	131
7.....	533	7.....	508
8.....	787	8.....	754
9.....	878	9.....	883
10.....	930	10.....	939
11.....	862	11.....	931
12.....	986	12.....	876
13.....	926	13.....	966
14.....	784	14.....	833
15.....	524	15.....	655
16 and over.....	592	16 and over.....	1,044
Total.....	<u>7,953</u>	Total.....	<u>8,520</u>

"The table we print next is our own and not 'Doctor' MacDonald's, although its figures are derived from his:

Boys under 14 examined.....	6,049
Girls under 14 examined.....	5,988
Boys of 14 and over examined.....	1,904
Girls of 14 and over examined.....	<u>2,532</u>



"We observe that the text of the bill which this indefatigable measurer wants Congress to pass in the interest of 'patho-social science' provides expressly that he shall continue his investigation in 'Hospitals and Schools,' his alleged purpose being that 'the causes of social evils shall be sought out with a view to lessening or preventing them.'

"Look sharp after the 'Doctor' MacDonald bill until the very end of the session."

*Wales F. Severance*, for the appellant.

*Franklin Bartlett*, for the respondent.

JENKS, J. :

The plaintiff alleges that he was graduated from the University of Rochester and from the Union Theological Seminary, and that thereafter in this country and in Europe he was a university student of medical subjects, especially of a medico-legal and criminological nature; that he served the government at Washington as a clerk, under the title of "Specialist in Education as a Preventive of Pauperism and Crime." He further alleges that he is widely and favorably known here, in Canada and in Europe, both as a student of criminology and a writer of various publications on that and kindred subjects. This article charges that the plaintiff, who it states is not a doctor, "entrapped" young girls and married women into disclosing their delicate confidences (and it is not even stated that this information was gained primarily to aid or to treat these women), and then published them in a book which he hawked for sale by advertisements assuring secret delivery. In other words, that the plaintiff gained confidences of women and compiled and offered to sell them, not in the interest of scientific information or good morals, but for money, in a way that would attract those of morbid and unclean minds. If the charge is true, the plaintiff did a vile thing.

The rest of the article is in form of imputations, based upon the plaintiff's report in a public document of his professional work. The fact that the article states that the statistics suggest a particular thought, but neither makes a direct charge nor asserts that but one conclusion is possible, does not afford immunity to the defendant.

(*Sanderson v. Caldwell*, 45 N. Y. 398; *Odgers Lib. & Sland.* [3d ed.] 134; *Rundell v. Butler*, 7 Barb. 260.) It is clear enough that the article states that the statistics justify the conclusion that the plaintiff in his professional work applies his testing machine and his tape more frequently to girls than to boys because of the sex of the former, and it is almost unnecessary to say that tape measurements at least indicate manual contact.

The "thought" is more clearly indicated by the statement that the propensity increases when the girls and boys are sixteen years of age and over, and by the comparison made in the relative number of boys and girls examined by Dr. Bowditch. The article may be construed as an imputation of indecent and lascivious conduct toward young girls under the cloak of professional investigation.

Upon demurrer we cannot hold that the article is within the purview of fair criticism in that it is confined to attack upon the work of the plaintiff and does not brand the workman as an object for public contempt, scorn and obloquy. (*Triggs v. Sun Printing & Pub. Assn.*, 179 N. Y. 144, 154; *Whistler v. Ruskin* [*Times* for Nov. 27, 1878], cited in *Odgers Lib. & Sland.* [3 ed.] 35; *Newell Sland. & Lib.* [2d ed.] 567.) Ordinarily such a question is for the jury (*Triggs v. Sun Printing & Pub. Assn.*, *supra*), and we think that it is in this case. The other points raised by the learned and able counsel for the appellant are discussed in the opinion in *MacDonald v. Sun Printing & Publishing Assn.*, No. 2 (111 App. Div. 465).

The interlocutory judgment is reversed, with costs, and the demurrer is overruled, with costs.

HOOKEB, GAYNOR, RICH and MILLER, JJ., concurred.

Interlocutory judgment reversed, with costs, and demurrer overruled, with costs, with leave to the defendant to plead over within twenty days upon payment.

App. Div.]

Second Department, March, 1906.

THE PEOPLE OF THE STATE OF NEW-YORK ex rel. WILLIAM M.  
LAWSON, Appellant, v. LENA L. LAWSON, Respondent.

Second Department, March 18, 1906.

**Habeas corpus to determine custody of child pending action for divorce.**

When on habeas corpus to determine the custody of children pending an action for divorce it is shown that the children are boys not of such tender years that the mother is essential to their daily living; that the mother is indiscreet, intemperate of speech and infirm of temper, and associates with men whose influence is bad, etc., while the father offers to such children a home in refined surroundings, their custody should be awarded to the father.

It is not ability to provide physical comforts and care only that weighs in deciding such issue, but the moral surroundings of the children are to be considered.

HIRSCHBERG, P. J., dissented, with memorandum.

APPEAL by the relator, William M. Lawson, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 27th day of July, 1905, denying the relator's motion to be awarded the custody of his minor children.

*Frank Harvey Field* [*R. Percy Chittenden* with him on the brief], for the appellant.

*Edmund L. Mooney*, for the respondent.

JENKS, J. :

The paramount consideration is the welfare of the children. (*People ex rel. Elder v. Elder*, 98 App. Div. 244, and authorities cited.) They are not of years so tender as to require award to the woman because the mother is essential to their daily living.

The record of life with the mother is before us. It is not enough that the children have not been naked and have not been hungry. They should have received care like unto that which moves a parent not only to clothe and feed his child, but to train him up in the way he should go. There has been a lack of such tutelage. A child is apt to pattern its life after that of its parent. These children are old enough to be impressed with their surroundings, to be molded by the course of their parents' life, and to remember even what they may not now understand.

The lads have lived a life of hotels and boarding houses. Disinterested affiants describe the mother as gay, indiscreet, intemperate of speech and infirm of temper. They depose that her habits are not good; that she rises late, keeps late hours abroad, and passes much time in the society of men whose influence is bad. In short, these people say that she so demeans herself as to be censured by prudent persons, both for her carriage and for her neglect of her children, even to their bodily cleanliness. No reason appears why we should discredit these affidavits, and no sufficient answer is made to them. This proceeding, then, must be determined by them, and we must take the situation as they describe it. It is not necessary to attribute it to intention, for inattention may have caused it.

Though the father is the subject of counter attack, there is no such showing against him. He is affluent. He offers his married sister's home, apparently one of educated and respectable people, as a home for his children, and his sister assents. The presumption is clear enough that the lads will be far better off there than in their present atmosphere. By this decision we do not prejudice the issues in the pending action for an absolute divorce. For the welfare of the children and the wrongdoing of a parent are quite different questions. The trial of these issues may reveal that the woman has been belied by these affiants, but we are clear that the question of custody as now presented must be determined in favor of the father. The mother should not be entirely cut off from access to the children, but should be allowed to visit them for two hours at a time, twice in each week.

The order must be reversed, and the custody awarded to the father, with such provision for access by the mother as we have indicated.

WOODWARD and MILLER, JJ., concurred; HIRSCHBERG, P. J., dissented in separate memorandum; RICH, J., took no part.

HIRSCHBERG, P. J. (dissenting):

I dissent. As the case contains counter charges, and a former trial was decided in defendant's favor; as the present custody of the children is the result of the plaintiff's abandonment of them; as they are very young and no serious injury has apparently been occasioned by their mother's care of them, and as the case can be

App. Div.]

First Department, March, 1906.

tried speedily on the merits if the plaintiff wishes, I think it would be wiser not to interfere with the discretion of the Special Term.

Order reversed, without costs, and custody awarded to the father, with such provision for access by the mother as indicated in the opinion of JENKS, J.

---

FRANCIS B. ROBERT, Appellant, v. DAVID KIDANSKY, Respondent,  
Impleaded with SIMEON SUGARMAN (Otherwise Known as SAM  
SUGARMAN).

First Department, March 9, 1906.

**Mortgage — assignor of mortgage who guarantees payment proper party on foreclosure — no action against such assignor for deficiency without leave of court — complaint not showing leave of court fails to state cause of action.**

The assignor of a mortgage, who guarantees that the assignee shall collect the debt, is a party liable to the plaintiff for the payment of the debt secured by the mortgage and may be made a party to an action to foreclose the same under section 1627 of the Code of Civil Procedure.

Hence, where the assignee has failed to make such assignor a party defendant in an action of foreclosure he cannot maintain a subsequent action against him for a deficiency without the leave of court required by section 1628 of the Code of Civil Procedure. A complaint in such subsequent action against the assignor which does not allege leave of court fails to state a cause of action.

APPEAL by the plaintiff, Francis B. Robert, from a judgment of the Supreme Court in favor of the defendant David Kidansky, entered in the office of the clerk of the county of New York on the 24th day of March, 1905, upon the dismissal of the complaint by direction of the court after a trial at the New York Trial Term, and also from an order entered in said clerk's office on the 15th day of April, 1905, denying the plaintiff's motion for a new trial made upon the minutes.

*Edmund L. Mooney*, for the appellant.

*John Frankenheimer*, for the respondent.

PATTERSON, J. :

On the trial of this action the defendant moved to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and the motion was granted. The plaintiff sought to recover a sum of money, being the amount of a defi-

ciency upon the sale of certain mortgaged premises. It is alleged in the complaint that on the 21st of April, 1894, Phillip Does made and delivered to the defendants Kidansky and Sugarman an indenture of mortgage to secure the payment of \$6,000 with interest, such mortgage being collateral to a bond therein described made by the same parties; that the defendants on the 18th of May, 1894, assigned the bond and mortgage to the plaintiff and "in and by the said assignment for a good and valuable consideration thereby guaranteed to the plaintiff, in writing, the collection of the said bond and mortgage." It is further alleged in the complaint that Does failed to perform the condition of the bond and mortgage by not paying the interest which became due and payable in October, 1894, and thereupon, in February, 1895, a foreclosure suit was brought, and on the 6th of June, 1895, a decree of foreclosure and sale was entered, and on the 9th of August, 1895, the premises were sold at public auction for \$1,500, and that after deducting the expenses of the foreclosure, a deficiency remained of \$5,488.72; that judgment for such deficiency was entered and an execution issued against Does in October, 1895, was returned wholly unsatisfied; that Does is insolvent; that all that was collected on the mortgage was \$985 and that the plaintiff is still the owner and holder of the bond and mortgage.

The specific ground upon which the complaint was dismissed is that it fails to state facts sufficient to constitute a cause of action, inasmuch as it contains no allegation that leave of the court was granted to sue for this deficiency. The action is plainly brought to recover a part of a mortgage debt ascertained to be, and adjusted at, the amount of the deficiency. By section 1628 of the Code of Civil Procedure it is enacted that "while an action to foreclose a mortgage upon real property is pending, or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt without leave of the court in which the former action was brought." By subdivision 1 of section 1627 of that Code it is provided that "any person who is liable to the plaintiff for the payment of the debt secured by the mortgage may be made a defendant in the action." It being alleged in the complaint that the present defendants were guarantors of the collection of the bond and mortgage, we think it is undeniable that they would have been proper parties to the foreclosure suit; and

App. Div.]

First Department, March, 1906.

that the plaintiff by making them parties thereto could have recovered a final judgment against them for a deficiency. Under the Revised Statutes an assignee of a bond and mortgage might make the assignor who guaranteed the collection thereof a party, in order to obtain a decree over against him for a deficiency in case it could not be collected by execution against the mortgagor, and the final judgment could so provide. (*Leonard v. Morris*, 9 Paige, 90; *Luce v. Hinds*, 1 Clarke Ch. 453.)

We are unable to see that any radical change in this respect has been made by the enactment of the Code of Civil Procedure. It still remains the obvious policy of the law to have brought into a foreclosure action all parties who may be liable for the mortgage debt. That such was the rule under the Revised Statutes is declared in *Vanderbilt v. Schreyer* (91 N. Y. 392). It is said in the opinion of the court in that case that "previous to the enactment of section 1627 of the Code of Civil Procedure it was the settled practice of courts of equity to bring all parties who were in any way liable for the payment of the mortgage debt, or any part thereof, and whether liable upon an absolute or conditional undertaking, into the same foreclosure action and decree payment of any deficiency arising on a sale of the mortgaged premises, against any of the parties appearing to be liable therefor, according to the nature and circumstances of such liability. The principle that such person, whether liable conditionally or absolutely, may be sued and made liable for any deficiency in an action to foreclose the mortgage is laid down in the works on chancery practice and sustained by numerous cases. (See 2 Hoffman's Ch. Pr. 141-2; 2 Barb. Ch. Pr. 175-6; *Leonard v. Morris*, 9 Paige, 90; *Suydam v. Bartle*, id. 294; *Curtis v. Tyler and Allen*,\* id. 432; *Griffith v. Robertson*, 15 Hun, 344; *Scotfield v. Decher*, 72 N. Y. 491.)" It has thus been decided that under the Revised Statutes a person might be made a party defendant in foreclosure who guaranteed either the payment or the collection of the mortgage. 2 R. S. (§ 154, p. 191) reads as follows: "If the mortgage debt be secured by the obligation or other evidence of debt hereafter executed, of any other person besides the mortgagor, the complainant may make such person a party to the bill, and the court may decree payment of the balance of such debt remaining unsatis-

\* *Curtis v. Tyler*.—[REP.]

fied after a sale of the mortgaged premises, as well against such other person as the mortgagor, and may enforce such decree as in other cases." Section 153 of the same statute (Id.) provided that "After such bill (for foreclosure) shall be filed, while the same is pending, and after a decree rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage or any part thereof unless authorised by the Court of Chancery."

It will be seen that the language of the provision of section 154 of the Revised Statutes above quoted appears to be permissive as to making a person (other than the mortgagor) who is liable for the debt a party, as does also that of section 1627 of the Code of Civil Procedure. In *Vanderbilt v. Schreyer* (*supra*) the court said that the scheme of the provisions of the Revised Statutes is to prevent oppressive litigation by the multiplication of actions *against the several persons* who may be liable for the same mortgage debt, and to require all of the parties interested in its payment to be brought into the same suit and thus settle their respective liabilities in one comprehensive action.

We are unable to perceive, as said before, that under the Code any change in the policy of the law in that regard has been operated. The defendants could have been made parties to the foreclosure action and the failure of the plaintiff to make them such should not operate to their detriment. It is claimed, however, by the appellant that the provision of section 1627 of the Code of Civil Procedure under consideration refers only to any person who is liable for the *payment* of the debt secured by the mortgage, and that it appears from the complaint in this action that the defendant only assumed responsibility for the collection of the mortgage debt. There is some difference between the phraseology of this section of the Code and the language of section 154 of the Revised Statutes. In construing the provision of the Revised Statutes the court held that it was immaterial whether the guaranty was one of payment or collection; that liability for the mortgage debt was imposed upon either; and that such liability was not to be assimilated to that of guarantors of commercial paper or other securities; and that the principles applicable to actions upon such securities do not apply to actions for the foreclosure of mortgages. (*Vanderbilt v. Schreyer, supra.*) The words of the Revised Statutes relate to all who are



App. Div.]

First Department, March, 1906.

under obligation to pay the mortgage debt or any part thereof, whether such obligation be absolute or conditional. The words "liable to the plaintiff for the payment of the mortgage debt," in the Code provision, are the equivalent of those used in the Revised Statutes. In *Reichert v. Stilwell* (172 N. Y. 89) it is said: "The Revised Statutes authorize the court in an action of foreclosure to render judgment against the person *liable* for the mortgage debt for any deficiency that may remain after selling the land and applying the proceeds." A party liable is one who may be held responsible either directly or conditionally. Liability is predicable of a contingent obligation as well as one matured and fixed. A guarantor of the collection of a mortgage assumes the responsibility of the payment of that mortgage out of the security given upon the land and collection is made through an action of foreclosure. In the present case collection of the mortgage is guaranteed; that collection was attempted by a foreclosure action which is "not an action to recover the mortgage debt from the mortgagor personally, but to collect it out of the land by enforcing the lien of the mortgage." (*Reichert v. Stilwell, supra*, 88.) The defendant's guaranty contemplated the foreclosure of the mortgage as a proceeding for the collection, satisfaction and discharge which is the equivalent of payment of the debt, and they became thus liable for the payment of so much of that debt as was not realized on foreclosure. The case of *Comstock v. Drohan* (71 N. Y. 9), which seems to be relied upon by the appellant, is not in point. It was held that under the facts of that case the provision of the Revised Statutes requiring leave of the court to sue for the recovery of a debt secured by a mortgage after a decree had been entered in a foreclosure action had no application, because the statute related only to the holder of a mortgage "who may and should enforce his claim for a deficiency in the foreclosure suit." In that case the plaintiff was not the holder of the mortgage. Here he is.

The judgment and order appealed from should be affirmed, with costs.

O'BRIEN, P. J., McLAUGHLIN, LAUGHLIN and HOUGHTON, JJ., concurred.

Judgment and order affirmed, with costs.

**MAX MARX, Plaintiff, v. CHARLES BROGAN, Defendant.**

First Department, March 9, 1906.

**Real property — covenant not to erect tenement house — such covenant not violated by erection of apartment house — burden of proof to show meaning of covenant.**

A contract between adjoining landowners, covenanting that neither of them will, for a period of twenty-five years, erect "any tenement house," is not violated by the erection of an apartment house of modern and superior construction.

There is a difference between an apartment house and a tenement house which will be recognized by the courts.

To restrain the erection of such apartment house as a violation of said covenant, the burden is on the plaintiff to show that the building is what is known as a "tenement house" within the meaning of the covenant.

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

*Eugene D. Boyer*, for the plaintiff.

*Henry W. Hayden*, for the defendant.

PATTERSON, J. :

The parties to this record have submitted their controversy upon an agreed statement of facts, pursuant to sections 1279, 1280 and 1281 of the Code of Civil Procedure, by which it appears that the plaintiff is the owner of a dwelling house at the southeasterly corner of Convent avenue and One Hundred and Forty-eighth street in the borough of Manhattan, city of New York, and the defendant is the owner of a vacant plot of ground adjoining the plaintiff's premises. On June 10, 1889, the parties to the submission entered into an agreement in writing in which it is recited that they are desirous of increasing the value of their lots and improving the character of the neighborhood, and it is then provided in the agreement as follows: "That for the period of 25 years next ensuing from the date hereof, there shall not be erected or permitted upon any part of said lots any tenement house, or any foundry, manufactory, distillery, billiard saloon, drinking saloon, store, shop or livery stable, or any noxious trade or business whatsoever." The defendant intending to erect a building upon his land, the plaintiff seeks

App. Div.]

First Department, March, 1906.

to enjoin him from so doing, on the ground that the proposed building, if erected, would be in violation of the restrictive covenant above set forth, and would seriously affect the value of the plaintiff's premises. The defendant insists that there is no violation of the covenant, but on the contrary that his proposed building is an apartment house of a superior character, and that such a structure is not within the inhibition of the covenant. In the submission the defendant's proposed building is described as an apartment house. It is referred to as a "six-story elevator apartment house of brick and limestone," and the details of construction are set forth. The ground floor is to consist of five apartments; three containing five rooms each; one containing six rooms, and one containing seven rooms. The five upper floors are to contain six apartments each, four of which will consist of five rooms each, and two of six rooms each. Each apartment, in addition to the rooms above mentioned, is to contain a private hall and private bathroom and closet, and each apartment includes a parlor, dining room, chamber, kitchen and servants' room. The floors are to be of hard wood, and the rooms are to be finished in oak and birchwood, and the parlors are to have mantels and open fireplaces; with gas logs. The walls are to be papered and decorated, except those of the dining rooms, which are to be paneled in antique oak. The building and all of the apartments are to be heated by steam, equipped for lighting by both electricity and gas; provided with hot and cold water conveyed in open-work plumbing, with gas ranges for cooking, dumbwaiter, and each apartment is to have a private long-distance telephone. The main hall is to be wainscoted with imported marble, and there is to be an electric passenger elevator for the use of all the tenants. A picture of the facade of the proposed building is annexed to the submission, and an inspection of it will show that if and when erected it will present a dignified and attractive appearance.

That there is a wide difference between a tenement house and an apartment house (and in the construction of covenants, such as that involved here, such difference is recognized by the courts) is well settled. (*Kitching v. Brown*, 180 N. Y. 414; *White v. Collins Building & Const. Co.*, 82 App. Div. 1.) While there is no actual

First Department, March, 1906.

[Vol. 111.]

legal definition of a tenement house, still, in the year 1889, when the covenant between these parties was made — and even prior thereto — the difference between such a house and an apartment house was a matter of common knowledge. In the submission the parties to this controversy have called the defendant's proposed building an apartment house, and the details of construction appearing in the record indicate its superior quality. In order to bring the structure which the defendant intends to erect within the operation of the restrictive covenant it is necessary for the plaintiff to show that it is what was known and understood to be a tenement house within the meaning of that covenant. That he has failed to do. With the recognized distinction between apartment and tenement houses the court cannot assume that the covenant will be violated by the defendant putting up a building of the character described in the submission.

Judgment should be ordered for the defendant, with costs.

O'BRIEN, P. J., INGRAHAM, LAUGHLIN and CLARKE, JJ., concurred.

Judgment ordered for defendant, with costs. Settle order on notice.

---

FLORENCE NUNNALLY, Respondent, v. NEW-YORKER STAATS-ZEITUNG,  
Sued Herein as NEW-YORKER STAATS-ZEITUNG CORPORATION,  
Appellant.

First Department, March 9, 1906.

**Libel — when complaint with allegation that libel referred to plaintiff is not demurrable.**

Where the plaintiff is not named in an article libelous *per se*, but is indicated by circumstances described in the article, and the complaint contains a general allegation, pursuant to section 535 of the Code of Civil Procedure, that the article was published concerning her, she may at trial show extrinsic facts which would connect her with the article, and the complaint is not subject to demurrer.

A contention that the article is so general that no one would understand that it referred to the plaintiff is not sustained when the allegations of special damage contained in the complaint show that plaintiff's employers understood her to be the person referred to, and in consequence thereof discharged her.

INGRAHAM and CLARKE, JJ., dissented, with opinion.

App. Div.]

First Department, March, 1906.

APPEAL by the defendant, the New-Yorker Staats-Zeitung, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 28th day of November, 1905, upon the decision of the court, rendered after a trial at the New York Special Term, overruling the defendant's demurrer to the complaint.

*John E. Donnelly*, for the appellant.

*George H. D. Foster*, for the respondent.

PATTERSON, J.:

The article published by the defendant, and which the plaintiff asserts constitutes a libel upon her, relates to the same matter as that considered in the case of *Nunnally v. Tribune Association* (111 App. Div. 485). It differs from the article published in the *Tribune* in some respects. There are not as many statements contained in the defendant's article which by proof the plaintiff could show referred to her, but there is enough to enable her to give evidence that she was the person defamed. It is indisputable that the publication complained of by the plaintiff is libelous *per se*, and that where a plaintiff is not named, "but is indicated by circumstances contained in the article which are capable of direct proof that the plaintiff was the person to whom reference was made," the action may be maintained. (*Corr v. Sun Printing & Publishing Assn.*, 177 N. Y. 135.) In commenting upon section 535 of the Code of Civil Procedure, it was said in *Hauptner v. White* (81 App. Div. 157): "Undoubtedly if evidence of any extrinsic fact would connect the plaintiff with this statement \* \* \* this provision of the Code would apply and the allegation of such fact in the complaint would be unnecessary." The allegation that the libelous matter was published of and concerning the plaintiff is one of fact and under such an allegation a plaintiff may give evidence of all the surrounding circumstances and other extraneous facts which would explain and point out the person to whom the allusion applies, if the general allegation authorized by the Code is controverted by the defendant in his answer. The matter is simply one of identification, and, as said by VANN, J., in *Corr v. Sun Printing & Publishing Assn.* (*supra*), "The effect of the statute is

to do away with the allegation of such facts as tend to identify the plaintiff as the person libeled. Unless it does this, it does nothing."

But assuming that if a libel is so general in its character that it may apply to any of a great number of persons, and is only made to relate to a particular plaintiff by his adoption of it as applicable to himself, the general allegation of identity authorized by the Code would be insufficient, then this complaint contains sufficient to enable the plaintiff to give proof under her general allegation.

The article states that the young man whose death is referred to therein, in his delirium, "is said to have repeatedly called the name of a girl who worked in a wholesale house down town, also to have given her address;" that "the Detectives Fitzsimons and O'Leary went to the address given by Melles, but the girl was not at home." Under the allegation of the complaint, the plaintiff could give evidence that she was the person referred to as living at that address. The article also contains the statement that the coroner said: "We naturally are unable to say what is in the case until we have interviewed the girl whose name young Melles gave in his delirium." She could give evidence that she was the person there referred to.

It is insisted by the appellant that the complaint is insufficient because from the character and text of the article no one reading it would understand that it referred to the plaintiff as the party suspected or accused of crime. But the allegation of the complaint in the statement of special damage shows that the plaintiff's employers understood her to be the person referred to in that article, for they discharged her from their employment in consequence of it.

The demurrer was properly overruled and the interlocutory judgment should be affirmed, with costs, with leave to the defendant to withdraw the demurrer and answer the complaint within twenty days from service of a copy of the order to be entered hereon, on payment of costs in this court and in the court below.

O'BRIEN, P. J., and LAUGHLIN, J., concurred; INGRAHAM and CLARKE, JJ., dissented.

INGRAHAM, J. (dissenting):

I do not think that the libel in this case refers to any particular individual so as to entitle the plaintiff to maintain an action by

App. Div.]

First Department, March, 1906.

merely alleging in the complaint, under section 535 of the Code of Civil Procedure, that the libel was published of and concerning her. The libel states the fact of the death of a theatrical agent "with symptoms which seem to indicate a case of poisoning;" that "In connection with this death the police are searching for a woman, who is said to reside somewhere on the upper East Side." It is further stated that the deceased was said to have repeatedly called the name of a girl who worked in a wholesale house downtown, and also to have given her address; that he called to his father, "She has done it; \* \* \* I wish to see her;" that he cried in his delirium, "Here she is again, keep me away from her. She gave me the stuff." It was further stated that a woman called up the apartment house over the telephone and asked about the deceased, and when told that he was ill, said it was too bad and that she would call on him in the course of the evening. There is nothing here to connect this person spoken of with any particular woman, so that the proof of any existing fact could show that it applied to the plaintiff. (*Hauptner v. White*, 81 App. Div. 153.)

I think the judgment should be reversed.

CLARKE, J., concurred.

Judgment affirmed, with costs, with leave to appellant to withdraw demurrer and to answer on payment of costs in this court and in the court below. Order filed.

---

FLORENCE NUNNALLY, Respondent, v. THE TRIBUNE ASSOCIATION,  
Appellant.

First Department, March 9, 1906.

**Libel — complaint — general allegation that libel referred to plaintiff — Code Civil Procedure, section 535, construed — when complaint containing general allegation will be sustained on demurrer.**

The common-law rule which requires the plaintiff in an action for libel to plead facts which connected the publication with him when such publication on its face did not directly or necessarily refer to him, has been abrogated by section 535 of the Code of Civil Procedure. Under said section both in libel and slander the application of the defamatory matter to the plaintiff has been made a question of fact. Such fact may be alleged in general terms, and, if

traversed by the answer, the plaintiff at trial must prove that the words referred to him.

*It seems*, that if an article were so general and indefinite that no one reading it could apply it to any particular person, more than a general allegation of its application to the plaintiff might be required.

But when it appears upon the face of the complaint that evidence may be given which will undoubtedly connect the plaintiff with the publication, a complaint is sufficient on demurrer which contains the allegation that the article was published of and concerning the plaintiff.

When a complaint shows that the article stated that a young man supposed to be poisoned was "keeping company" with a young woman, whose name and address he gave in his delirium, and that the plaintiff was discharged by her employers by reason of their identifying her with said article, it is not subject to demurrer when it contains the said general allegation, that the article referred to her, allowed by section 585 of the Code of Civil Procedure.

APPEAL by the defendant, The Tribune Association, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 28th day of November, 1905, upon the decision of the court, rendered after a trial at the New York Special Term, overruling the defendant's demurrer to the complaint.

*Henry W. Sackett*, for the appellant.

*George H. D. Foster*, for the respondent.

PATTERSON, J.:

The defendant demurred to the complaint in an action to recover damages for libel; the demurrer was overruled and the defendant appeals.

The defendant is a publisher of a newspaper, and its issue of the 7th day of March, 1904, contained an article a copy of which is annexed to and made part of the complaint, and it is therein stated that detectives were searching for a young woman to explain the death of Leon Melles, twenty-eight years old, a theatrical agent, who died at his home, 400 Manhattan avenue, after convulsions; that a doctor who attended Melles said he believed the young man was the victim of "knock-out drops;" that in delirium, before he died, Melles mentioned the name of a young woman with whom, his father said, he had "been keeping company" for about a year; that the police say that after he mentioned the woman's name he



App. Div.]

First Department, March, 1906.

said, "She's responsible for this. She gave me the dose." The article then proceeds to state the circumstances under which Melles died, and that after he was seized with convulsions a doctor was sent for who declared there were symptoms of poisoning and treated the patient accordingly; that the physician said that he saw signs of chloral and cocaine. The article then proceeds to say: "According to Mr. Melles and Dr. Buffum, Melles mentioned the name of a young woman employed in a downtown wholesale house, and gave her home address. He mentioned her name frequently and said, 'She did it. I want to see her.' At one time he said deliriously, 'There she is again. Let me get her.'" It is then said that detectives went to the address given by Melles, and found that the young woman lived there; that she was not at home, "but they said last night that they expected to arrest her within a few hours. The police say that Melles' watch was missing and that he had no money about him when he returned home. About noon yesterday a woman called up the Parthenon apartments and asked how 'Mr. Melles was getting on.' She was told that he was very ill, and, according to the elevator boy, replied, 'That is too bad. Tell him that I will be up this evening to see him.' The woman did not give her name and did not appear as she had promised. The police and Coroner Scholer are anxious to learn her identity. Coroner Scholer said last night: 'We cannot tell much about this case until we examine the young woman mentioned by Melles in his delirium. I think he was poisoned but cannot make a positive statement until an autopsy is performed. I have instructed Dr. Weston to perform an autopsy to-morrow morning.'

It is alleged in the complaint that the defamatory matters contained in the article were published of and concerning the plaintiff. The court below held that that was a sufficient allegation of identity, under the provisions of section 535 of the Code of Civil Procedure. It is not controverted by the appellant, but, on the contrary, it is specifically admitted that this defamatory matter is libelous *per se*; and it is also conceded that the plaintiff duly alleges under section 535 of the Code of Civil Procedure that it was published of and concerning her. By that section it is provided that "it is not necessary in an action for libel or slander to state in the complaint *any* extrinsic fact, for the purpose of showing the application to the

plaintiff, of the defamatory matter, but the plaintiff may state generally that it was published or spoken concerning him; and if that allegation is controverted, the plaintiff must establish it on the trial." It is required in an action either for libel or slander that the complaint shall show that the defamatory words were published or spoken of or concerning the plaintiff. At the common law, where the libelous publication did not directly or necessarily on its face refer to the plaintiff, in order to maintain an action the plaintiff was obliged to allege in his declaration such extrinsic facts and circumstances as when connected with the libelous publication the conclusion would be inevitable in the mind of the reader that it was intended to defame the plaintiff. But in this State the common-law rule of pleading has been superseded by statutory enactment, the provision of the Code of Civil Procedure being substantially a re-enactment of section 164 of the Code of Procedure. It is still necessary in an action for libel that the complaint should contain an averment that the defamatory words directly relate to the plaintiff, but the pleader is absolved from the necessity of stating extraneous circumstances which connect the plaintiff with the publication. If the general allegation is made as allowed by section 535 of the Code of Civil Procedure, the defendant may controvert it in his answer, and then it becomes obligatory upon the plaintiff, by evidence, to establish the fact that he is the person who is actually defamed by the publication. The statute has changed the identification by facts and circumstances of a plaintiff as the person mentioned in a defamatory publication from a rule of pleading to a subject of evidence. The allegation that the alleged libelous article was published of and concerning the plaintiff is one of fact, for it is traversible, and, if denied, the plaintiff must prove it.

The learned counsel for the appellant does not controvert these general propositions, but very clearly and forcibly contends: "That no matter how libelous an article may be, no matter how grave may be the nature of the crime there stated to have been committed, if it is not charged upon any particular individual or if the charge is so indefinite that it is impossible for any reader to infer from the article who the individual is to whom the wrongdoing is imputed, no one has been injured and no action can be maintained for libel upon it by any one." And he urges that "if no reader of the pub-

App. Div.]

First Department, March, 1906.

lication could discover that any person was referred to specifically, then no one has been libeled, because no one has been damaged, and this would be equally true even though the plaintiff and the defendant knew that it was published 'concerning her.' We may assume that a newspaper article may be so general and indefinite in its terms that no one reading it could understand that it applied to any particular person, and it may be that by selecting himself as the person referred to in the defamatory matter when it may apply as well to any of an indefinite number of other persons, something more would be required from a plaintiff in pleading than the formal statement authorized by the section of the Code cited. But we conceive the rule to be, under the Code, that where it appears on the face of a complaint that evidence may be given by a plaintiff which will undoubtedly connect him with the alleged libelous matter, such a complaint is sufficient where it charges that the matter was published of and concerning him.

The complaint now before us is not like those in *Fleischmann v. Bennett* (87 N. Y. 231) and *Corr v. Sun Printing & Publishing Assn.* (177 id. 131). In the complaints in those cases there were allegations which showed that the libelous matter did not relate to the plaintiff. Nor is this a case of ambiguity concerning the substance or meaning of the publication. It is charged in the article that young Melles was "keeping company" with a young woman whose name he mentioned; that the police detectives went to the address given by the father of Melles and found that the young woman lived there. The plaintiff, therefore, on the trial could prove that she was the young woman who had been "keeping company" with young Melles and that she was the person who lived at the address given to the police, and hence that she was the person referred to and intended to be referred to in the article of which she complains. But further it appears by the complaint in this action that the article was not so obscure in its reference to the plaintiff that one reading it would not associate her with the young woman mentioned therein. She asserts a claim for special damage occasioned by this article coming to the knowledge of her employers and alleges that she was discharged from her employment in consequence of the publication.

The interlocutory judgment appealed from should be affirmed,

with costs, with leave to the defendant to withdraw the demurrer and answer the complaint within twenty days from service of the order to be entered hereon, on payment of costs in this court and in the court below.

O'BRIEN, P. J., and LAUGHLIN, J., concurred; INGRAHAM and CLARKE, JJ., concurred in result.

Judgment affirmed, with costs, with leave to appellant to withdraw demurrer and to answer on payment of costs in this court and in the court below.

---

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. MILTON M. SEKESON, Appellant.

First Department, March 9, 1906.

**Crime — larceny — admission of evidence of another and unconnected theft by defendant reversible error — confession of defendant to said unrelated theft not admissible against him.**

On the trial of an indictment for grand larceny in stealing a diamond pin, it is reversible error to admit, against objection, evidence of a former and unrelated larceny by the defendant. It is not permissible to introduce evidence of an independent crime to establish the guilt of a person indicted for a specific offense.

Such evidence only becomes admissible when the two crimes were committed in pursuance of a single scheme or design.

When several witnesses have been allowed to testify as to such independent crime, the error is not cured by striking out some of the testimony if other parts remain on the record not stricken out and the judge in his charge makes no reference to such evidence and fails to instruct the jury to disregard it.

The admission of evidence of such unrelated crime is none the less error because given as a confession made by the defendant to one of the witnesses.

APPEAL by the defendant, Milton M. Sekeson, from a judgment of the Court of General Sessions of the Peace in and for the City and County of New York in favor of the plaintiff, rendered on the 13th day of April, 1904, convicting the defendant of the crime of grand larceny.

*Aaron J. Levy*, for the appellant.

*E. Crosby Kindleberger*, for the respondent.

App. Div.]

First Department, March, 1906.

PATTERSON, J. :

The defendant was indicted for the crime of grand larceny in the first degree, and upon trial in the Court of General Sessions of the Peace in and for the City and County of New York was found guilty of the charge. There were two counts in the indictment; the first charging him with feloniously stealing, taking and carrying away on the 11th day of July, 1903, a number of articles of jewelry, the property of one Joseph Rosenthal; the second with feloniously receiving and having in his possession the property alleged in the first count to have been feloniously stolen, taken and carried away. The prosecution abandoned the second count. Among the articles charged to have been stolen by the defendant was a pin of the value of \$550. It was a bar diamond pin. There was another pin mentioned in the indictment—bearing the letters "Y. P. C." It was a badge of membership of a club called the "Young Potomac Cadets" and was of trifling value. While the general drift of the evidence on the part of the prosecution tended to show that the defendant originally might have taken all the articles enumerated in the indictment, yet the case seems to have gone to the jury finally upon the question of the theft of the diamond pin only, the learned recorder stating in his charge that "if the diamond pin in question belonged to the complaining witness and the defendant intending to deprive the complaining witness of its possession took it away, he stole it and is guilty of larceny."

It seems to be plain that during the trial and in the ultimate presentation of the case to the jury, the guilt or innocence of the defendant was made to depend upon his felonious or innocent possession of this one selected, particular article, mentioned in the indictment, although it was charged to have been taken from a box in a safe in which all the abstracted articles were kept. The principal witness for the prosecution was Joseph Rosenthal, who testified that he was the owner of the jewelry mentioned in the indictment, all of it having been a gift from his mother; that it was kept in a box in a large safe in the jewelry store of his father at No. 254 Bowery in the city of New York; that the defendant was his intimate friend and very close social relations existed between them, as well as between the families of which they were respectively members; that the defendant frequently spent the night with the witness,

sleeping in apartments above the store. Rosenthal, Sr., had sustained injuries due to an accident and went to the upper part of the city to the house of his brother, whereupon the witness invited the defendant to stay with him while his father was sick. The invitation was accepted, and the defendant slept in the same room with the witness, going into the store every day. This witness also testified that on July 8, 1903, he showed all of the jewelry mentioned in the indictment to the defendant; that the diamond pin was there and also the "Y. P. C." pin and that he put all of the jewelry back in the box in the presence of the defendant. The witness did not look at the box again until the fourteenth of July — six days after he states he showed it to the defendant. The key of the safe the witness kept on a bunch of keys, which, after showing the defendant the jewelry, he threw upon a desk in front of the safe and behind the counter. When the witness undertook on the fourteenth to open the safe he found the key was missing from the ring. The safe then was forced open and it was discovered that the jewelry was gone. He states that he notified the defendant, who said, "Don't worry, they must be around here some place." Search was made through the store for the missing articles and detectives were employed to aid in that search. On the fifteenth of July the defendant came to the store, took off his coat and hung it up in a room back of the store and put on another coat and went away. One of the officers suggested that the pockets of the coat which the defendant had taken off and hung up should be examined. The witness says he looked in the pocket and found in one of them the "Y. P. C." pin, which he insists was his pin, and that the defendant returning, asked if the jewelry had been found, and he was told it had not. He was not informed that the pin last mentioned had been found in the pocket of his coat. He then assisted in the search. Meantime, according to the statements of young Rosenthal, a thorough search had been made through the whole premises without success, and on the seventeenth of July, the defendant being with him up stairs, declared that the jewelry must be somewhere around, and went to the office and in about twenty minutes returned with a handful of jewelry, saying "I found the jewelry." He laid it on a trunk and the witness says he asked the defendant to go down stairs and show where he found it. They went down and the defend-

App. Div.]

First Department, March, 1906.

ant pointed to a spot which the witness says he and his uncle no less than three times had examined. The defendant brought up all the jewelry, except a couple of small pieces. Everybody congratulated the defendant, and then he was told that the large diamond pin was missing, and Rosenthal, Jr., swears that the defendant said it was odd that that pin should not be found with the rest of the goods, as it was there. It was subsequently traced to a pawnbroker's office, and it sufficiently appears in the proof that the defendant took it there and pawned it in the name of "Kahn." Evidently all the articles mentioned in the indictment, with the exception, perhaps, of one or two very small ones and the large diamond pin, were recovered by or restored to the owner on the seventeenth of July.

Two witnesses for the prosecution, namely, Krauch and Firneisen, police officers, corroborated the story of Joseph Rosenthal relating to the discovery of the "Y. P. C." pin in the pocket of the defendant's coat. Krouch's connection with the case began on the fifteenth of July. He testified that he was present when the small pin was discovered, and also that he had searched the place at which the defendant stated he found the other jewelry. He made the arrest of the defendant, stating to him that it was for stealing the jewelry at Rosenthal's. He asked the defendant if he ever owned a silver badge with "Y. P. C." on it, and the defendant said, "No." The defendant asked if he could talk with Joseph Rosenthal and was told he could. This witness then states the conversation. He says that the defendant asked Rosenthal, "what do you want from me?" and Rosenthal replied that he wanted "that three-stone pin that you took." The defendant said he did not take it. Rosenthal said, "Yes, you did. \* \* \* I am not doing this for your sake, but I am doing it for your family's sake, and I want it." The defendant said, "The pin is all right." Then this officer remarked, "What do you mean, all right?" The defendant said, "Well, \* \* \* the pin is pawned," and stated that he pawned it the day after the jewelry was found; that he kept the pin and pawned it in the name of "Kahn," and received \$150. This witness also testified that he discovered at the pawnbroker's that it had been pledged on the eleventh of July, which is the day on which the larceny was committed as charged in the indictment. After the arrest this

officer had a further conversation with the defendant. The court remarked that if the conversation did not relate to the transaction the witness should not narrate it. He testified that it related to jewelry which had been taken previously — a pair of earrings. Another witness, Firneisen, testified to a general search that had been made through the apartments for the jewelry. And still another, a detective sergeant (Granville), testified to a conversation with the defendant respecting the pawning of the diamond pin. He declared that the defendant said that he had pawned it on the eighteenth, but this witness discovered that it was actually pledged on July eleventh for \$150 in the name of one "Kahn." The defendant, sworn on his own behalf, testified to the intimacy existing between young Rosenthal and himself, and the friendly relations between the two families. He also swore that he was a member of the "Y. P. C." club; that it was a school boys' club to which he at one time belonged, and that the badge found in the pocket of the coat was his property and that he had it in the coat pocket on the day it was found. He also testified that young Rosenthal never was a member of that club; that he had seen the box of jewelry a number of times; that July eighth was not the first time he saw it, but he did see it on that day; that he remained with Rosenthal up to the fourteenth of July; that on the morning after the night of the discovery of the disappearance of the jewelry young Rosenthal said to him that the box of jewelry was gone; that at the direction of the defendant young Rosenthal made out a list of the jewelry that was missing, and there was nothing on that list concerning the three-stone bar pin, and that he did not say anything about the pin being in that box; that young Rosenthal, in April, was at the defendant's father's house and had the pin with him; it was a Sunday afternoon, and he came to take dinner with the defendant's family; that young Rosenthal then produced the pin and said to a Mr. Levine, who was present, "Levine, I got a bargain for you. Here is a nice pin. Buy it." Levine said, "I haven't got any money just now." Rosenthal then said to the defendant, "Mike, won't this look nice for ma?" meaning the defendant's mother. The defendant replied, "I don't know. I will see what the folks say, and if they say I shall buy it I will consider it." The defendant testified that "a couple of days



App. Div.]

First Department, March, 1906.

after" he bought the pin for his mother, and that she had been wearing it ever since, until it was pawned; that he agreed to pay Rosenthal \$225 for it, and that his mother wore the pin very often when she went out; that on the eleventh of July his father came to his mother and asked her to let him have it; that he wanted to raise some money for the completion of a contract to do some work on a house on Madison avenue; that he, the defendant, pledged the pin at Simpson's for \$150, and used a different name because he had never been in a pawn shop before and did not want his name used in such a shop. He claims to have paid \$100 on account of this pin. He then testified to finding the jewelry and its delivery by him to young Rosenthal. He also swore that he was a member of the Young Potomac Cadets until 1898. Isaac Sekosky, the defendant's father, testified that young Rosenthal was a frequent visitor at his house and had been for a number of years coming there as a school boy friend of his son; that he remembered Rosenthal, Jr., coming to his house in the months of February, March, April, May and June, 1903, and on various occasions showing different kinds of jewelry and that he showed the diamond pin in question. The first time the witness saw it was in the latter part of April, 1903; his wife, daughter, son and a man named Levine were also present. Rosenthal, Jr., tried to sell it to Levine, who said he did not have the money to buy it and then he offered it to the defendant, saying, "Buy it for Ma." It was not bought on that day. Subsequently the defendant brought it home and said, "Mama, I bought that pin." It was a couple of weeks later. "My wife wore it after during the months of May and June. She wore it on Sundays and Saturdays when she used to go out. She wore it to a wedding." Hyman Levine, a witness on behalf of the defendant, also testified to the fact that Rosenthal offered to sell him a pin with three stones and he afterwards saw the pin on Mrs. Sekeson, the defendant's mother, in the house, as she went away to a wedding. Mrs. Sekeson, the mother of the defendant, testified to the offer of Rosenthal to sell the pin to Levine, who would not buy it, and that her son gave it to her in the early part of May. Sophie Sekeson, a sister, corroborates her mother and her father as to the offer of Rosenthal, Jr., to sell the pin to Levine and his subsequent suggestion to the defendant that the pin should be bought for his mother; and this

witness recognized the pin on the trial and said she could not be mistaken about it; that her mother wore it on several occasions; that she so wore it at a wedding at Webster Hall; that Rosenthal, Jr., was there and that he went in the same carriage with her mother. Bertha Sekeson, the mother of the defendant, testified that she wore the pin at that wedding and that Rosenthal rode with her in the same carriage and that she had the pin on then. Witnesses were then produced on behalf of the defendant who testified concerning the "Young Potomac Cadets," and their testimony was to the effect that Rosenthal was not a member of that club, but that the defendant was.

In rebuttal the prosecution introduced evidence as to the club badge or pin and that young Rosenthal was a member of the club. It was sought to identify the pin as belonging to the latter by the mark of solder which had been used in repairing it. Two witnesses, namely, Robert E. Rosenthal, the uncle, and Geneva Rosenthal, his wife, testified that the three-stone diamond pin was in the possession of the wife for several days in the early part of July; that she borrowed it and that it was returned before the eleventh day of that month. From whom it was borrowed, whether from young Rosenthal or from his father, does not appear. It is a noticeable circumstance that young Rosenthal in his testimony does not refer to the diamond pin ever having been out of his possession before the eleventh of July. On his direct examination he was asked specifically to state to whom, other than the defendant, he had showed that pin, and he made no reference whatever to the very important fact, if it be a fact, that his aunt had borrowed and used it at a time so near the day named in the indictment.

From this general statement of the evidence respecting the ownership of the society or badge pin found in the pocket of the defendant's coat, and the conflict concerning the way in which the defendant became possessed of the diamond pin, which he pledged, it is easily seen that the jury might have found either way as to the guilt or innocence of the defendant; and if there were nothing further in the case to affect the verdict, we should not be inclined to disturb it.

There was introduced in the case, however, an element which may have had great influence with the jury and may have inclined

App. Div.]

First Department, March, 1906.

them to pronounce the defendant guilty. That element is an alleged confession of the defendant that he had been guilty of larceny at an earlier date in taking a pair of earrings, the property of young Rosenthal's father. The record as to those earrings is curious. On the redirect examination of young Rosenthal, in answer to a question of the district attorney, he stated, "We missed a pair of diamond earrings in April." That was objected to and the court stated that it would sustain the objection unless the district attorney intended to connect it. Such intention was announced. The court was unable to perceive that the matter was material, but received the evidence subject to a motion to strike it out if not connected. Subsequently the same witness testified that the defendant told him after his arrest where the pair of earrings was. The court then sustained an objection to evidence concerning the earrings and the subject seems thereupon to have been dropped until the detective Krauch was examined. He, after testifying respecting the defendant's confession as to the diamond pin, stated that in conversation with the defendant reference was made to "another piece of jewelry which had been taken — a pair of earrings." Again the court appears to have ruled out evidence of this conversation. On rebuttal Robert J. Rosenthal testified that he had had a conversation with the defendant on the nineteenth of July, and was asked whether he had heard any other conversation that took place between the defendant and any other person on that day or any day after that. His reply was in the affirmative, and he was asked what the conversation was. He swore that he said to the defendant, "There is a couple of pair of diamond earrings that have been missing." The defendant's counsel objected to any testimony of that character and asked that it be stricken out. The objection was overruled and an exception taken. Counsel for the defendant referred to the fact that all evidence of that character had been stricken out the day before. The witness testified that he said to the defendant, "If you pawned them for a smaller amount, why let us know about that and we will get them," to which the defendant responded, "If you will have me remanded I will see what I can do." Subsequently this witness saw the defendant again and testified that the defendant said, "I took them earrings and I made

them into studs; \* \* \* I pawned them in Simpson's in 42nd Street and I got, I think, \$160 for one and \$140 for the other." That evidence was received under objection and exception. Young Rosenthal, on being recalled, produced a pair of earrings in court. He said he heard the conversation between the defendant and the police officers relating to the diamond earrings which had been turned into studs; that those produced in court were the articles. Defendant's counsel objected to evidence concerning them, saying that that transaction was not before the jury and they were not in a position to explain anything in connection with it; that "it is purely a collateral matter, not connected in point of time and circumstances with the charge at bar." The court then ruled that evidence of that transaction was "bringing up collateral matter," and sustained the objection.

Thus it will be seen that evidence as to those earrings was admitted when given by one witness, and was rejected when another was interrogated concerning the same articles. But the testimony of the one witness as to the confession respecting them remained in the record, and in the charge to the jury the court made no allusion to the condition of the evidence on the subject. With that evidence in the case, unless the jury were charged specifically respecting it and were told they were not to consider it, it is not difficult to comprehend how potent or how prejudicial it would be as affecting their judgment in reaching a conclusion adverse to the defendant. It is not permissible to introduce evidence of an independent crime to establish the guilt of a person indicted for a specific offense. As was remarked by CHURCH, Ch. J., in *People v. Crapo* (76 N. Y. 291), "an accused person is required to meet the specific charge made against him and is not called upon to defend himself against every act of his life."

The learned district attorney insists that the evidence was admissible in that it showed a systematic scheme of larceny pursued by the defendant. Evidence of such a systematic course is sometimes admissible, but it must be in pursuance of a single design, as was the case in *People v. Zucker* (20 App. Div. 363; *affd.*, 154 N. Y. 770). In *People v. Molineux* (168 N. Y. 264, 305) speaking of exceptions to the general rule which excludes proof of extraneous crimes, it is said: "There must be evidence of system between the offense

App. Div.]

First Department, March, 1906.

on trial and the one sought to be introduced. They must be connected as parts of a general and composite plan or scheme, or they must be so related to each other as to show a common motive or intent running through both. \* \* \* 'Some connection between the crimes must be shown to have existed in fact and in the mind of the actor, uniting them for the accomplishment of a common purpose, before such evidence can be received.'" The last utterance as to the law constituting an exception to the general rule as to the inadmissibility of evidence respecting independent crimes is in *People v. Loomis* (178 N. Y. 400). The independent unrelated and unconnected crime cannot be established by the confession of the alleged criminal any more than it can be by extrinsic evidence. It is obvious that the alleged confession of the defendant respecting the earrings was made during another conversation than that in which it was claimed he admitted the larceny of the diamond pin. There was no legal connection between the two offenses. They differed as to time and circumstances and it is not shown clearly from what particular place the earrings were taken — if that is important. Nor was the evidence necessary to show intent. If the jury believed the witnesses for the People, the intent with which the diamond pin was taken is so manifest that no one could question it.

On the record before us and in view of all that appears therein, we are convinced that this defendant should have a new trial. As was remarked in *People v. Loomis* (*supra*) it cannot be said that the error in admitting this unexpunged evidence did not affect the substantial rights of the defendant. It may be that he would have been convicted without the evidence of his confession of an antecedent larceny, "but it is enough to say that it may also have been sufficient to resolve against him any reasonable doubt that might previously have been entertained as to his guilt."

The judgment of conviction should be reversed and a new trial ordered.

O'BRYEN, P. J., INGRAHAM, LAUGHLIN and CLARKE, JJ., concurred.

Judgment reversed and new trial ordered.

MARY BAKER, Appellant, v. METROPOLITAN LIFE INSURANCE COMPANY, Defendant, Impleaded with CHARLES BAKER and Others, Respondents.

First Department, March 9, 1906.

**Life insurance — evidence insufficient to show gift of policy to wife.**

The plaintiff, the second wife of the insured, claimed that a policy of insurance on her husband's life had been given to her in consideration of her promise to marry him. The policy named the former wife of the insured as beneficiary and no change of beneficiaries was shown to have been made. The only evidence that the policy was ever given to the plaintiff was the testimony of a witness that in 1901 the insured said that, if the plaintiff were to marry him, he had nothing else to offer her but his insurance, and that his only desire was that none of his children should get it. The plaintiff did not marry the insured until 1904. There was no proof of the delivery of the policy.

*Held*, that there was a total failure to establish a gift of the policy to the plaintiff, and that she was entitled to the proceeds thereof only as administratrix of the insured.

O'BRIEN, P. J., dissented, with opinion.

APPEAL by the plaintiff, Mary Baker, from a judgment of the Supreme Court in favor of the defendants Charles Baker and others, entered in the office of the clerk of the county of New York on the 9th day of June, 1905, upon the decision of the court rendered after a trial at the New York Special Term.

*John McG. Goodale*, for the appellant.

*Leonard J. Langbein*, for the respondents.

PATTERSON, J.:

The plaintiff, claiming to be the owner thereof, sued upon a policy or certificate of life insurance issued by the Metropolitan Life Insurance Company of the city of New York. That policy was issued in 1884 to Adam Baker, and it recited that it was so issued in consideration of representations and agreements in a printed and written application for the policy and in consideration of a premium to be paid at certain times. In the application Adam Baker stated that he was a married man, and that the person to whom the benefit was to be paid was his wife. At that time he

App. Div.]

First Department, March, 1906.

was married to Rose Baker, who died on or about the 12th of February, 1886. He married the plaintiff in August, 1904. It does not appear that the beneficiary named in the policy was ever changed. The plaintiff sued the insurance company, which admitted its liability and set up that other persons made claim to the amount of the policy, such other persons being the individual defendants in this action; that the plaintiff had been appointed administratrix of the goods, etc., of her deceased husband, and the matter in contest, as it eventually shaped itself on the trial, involved only the inquiry whether the plaintiff was entitled to the amount of the policy individually, or should receive it as administratrix. The court below adjudged that she was entitled to the money only in the latter capacity.

The judgment should be affirmed. It is claimed by the plaintiff that the policy was given to her by Adam Baker in consideration of her promise to marry him. The proof on that subject is insufficient to substantiate that claim. The only evidence in that regard was in the testimony of the witness Mary Sullivan, who states that Baker said in her hearing that if the plaintiff would marry him he had nothing else to offer but his insurance, and his only desire was that none of his children should get it. On her cross-examination, however, it appears that that statement was made in February, 1901, and the plaintiff was not married to Baker until 1904. There is not a syllable of proof to show that the policy ever was delivered to the plaintiff as a gift. She had been married to Baker only four months when he died. She says she paid the premiums quarterly, fifty cents a week. Proof of delivery is entirely wanting, and the judgment of the court below, as the case was tried, that she was entitled to the amount represented by the policy only as administratrix, was clearly justified.

The judgment appealed from should be affirmed, with costs.

McLAUGHLIN, LAUGHLIN and HOUGHTON, JJ., concurred; O'BRIEN, P. J., dissented.

O'BRIEN, P. J. (dissenting):

The plaintiff brings this action upon a policy of life insurance issued by the Metropolitan Life Insurance Company of the city of New York, claiming to be entitled individually as beneficiary and

donee of the said policy. The Metropolitan Life Insurance Company does not dispute its liability under the policy, but sets up that there are other claimants who dispute the claim of the plaintiff. These other claimants are children of the insured, and contend that the policy is part of the estate of the insured. The court below, sustaining the latter claimants, the individual defendants, gave the proceeds to the plaintiff in her capacity as administratrix of the insured.

The policy here sued upon was issued in 1884 on the life of Adam Baker. It was issued in consideration of representations and agreements contained in the application therefor, and said application was made a part of this policy. In the application Adam Baker stated that he was married, and directed that the benefit be paid to his "wife," leaving blank, however, the space intended for the name of the beneficiary. The policy or certificate proper contained no designation of beneficiary. At the time of the issuance of the policy Rose Baker was the wife of Adam Baker, the insured. Rose Baker died on or about the 12th of February, 1886. The individual defendants are children of Adam Baker by a union preceding that with Rose Baker, Rose Baker having had no children. Adam Baker designated no new beneficiary after the death of Rose Baker. As the plaintiff was not the wife of the insured at the time of his taking the insurance and making the designation of beneficiary, I agree that she is not the beneficiary contemplated and cannot take as such. However, upon the death of Rose Baker the policy reverted to Adam Baker (*Olmsted v. Keyes*, 85 N. Y. 593), and, in my opinion, the evidence is sufficient to establish a gift thereafter of the policy to the plaintiff.

The plaintiff is debarred from testifying concerning the transactions between her and the insured under section 829 of the Code of Civil Procedure. She does testify, however, that she filed the policy and proofs of death with the Metropolitan Life Insurance Company; that she had had the policies in her possession for four years before the death of the insured; and that during those four years she had paid the premiums upon the policy. Her testimony is supported by the testimony of Mary Sullivan, a boarding-house keeper with whom the plaintiff and the insured lived for a time in 1901, that the insured in 1901 promised to give the policy to the plaintiff if



App. Div.]

First Department, March, 1906.

she would marry him, as he had nothing else to offer, and that the plaintiff thereafter paid the premiums upon the policy. The plaintiff subsequently married the insured. This testimony is not contradicted or shaken by the defendants, their case being confined to showing that the plaintiff was not the wife of the insured at the time the policy was issued and that there has been no designation of a beneficiary by the insured subsequent to the death of his then wife.

There is no direct proof of the delivery of the policy to the plaintiff, but it may be implied from her possession and from the circumstances surrounding the parties and their relations. In *Bedell v. Carll* (33 N. Y. 581) the plaintiff sued upon a certain promissory note made to her father and indorsed by him in blank and which plaintiff alleged that he had given and delivered to her. Upon the question of delivery and gift the court in that case said: "Before his death, and it may be admitted during his last illness, he indorsed the note in blank, and delivered it over to the plaintiff. I repeat, delivered it to the plaintiff, for the production by her of the note, indorsed in blank, was ample proof of its delivery. Why this indorsement and delivery of the note into the immediate possession of the plaintiff, unless a gift was intended? It was precisely what was required to be done to make a valid and effectual gift. The acts are explainable on no other theory. When, therefore, the plaintiff rested, she had shown *prima facie* a gift of the note from her father; and the defendants offering no proof, upon this theory of the case, their exception to the direction of the court to the jury to find a verdict for the amount of her claim was without force." Of similar import is the case of *Rix v. Hunt* (16 App. Div. 540), in which case the notes were unindorsed.

If a consideration were required to support the gift, then the marriage was sufficient. In a gift, however, a consideration is not necessary, but delivery and possession are necessary. Upon the facts here I think the conclusion reached that the plaintiff was not the donee of the policy is against the weight of evidence and that the judgment accordingly should be reversed.

Judgment affirmed, with costs. Order filed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. ABRAM  
LIPP, Appellant.

First Department, March 9, 1906.

**Crime — payment for goods with worthless cheque — evidence insufficient to sustain conviction for violation of section 529 of the Penal Code — erroneous refusal to charge — jurisdiction, question cannot be raised on conflicting evidence.**

When on the trial of an indictment for a violation of section 529 of the Penal Code in giving a worthless cheque in payment for goods, it is shown that after the dishonor of the cheque the vendor's agent went to Maine with the defendant and negotiated a transfer of real estate in that State to secure the sum due, thus treating the transaction as a simple indebtedness, and when such agent is not produced by the complainant on the trial to rebut the claim of the defendant that presentation of said cheque was to be delayed, and when the trial judge refuses to charge that the jury may consider the conduct of the parties toward each other on the question of criminal intent, a new trial should be granted in furtherance of justice.

When there is an issue as to whether the goods were delivered to the defendant in New York or in Boston, Mass., by express, the defendant cannot raise the question of jurisdiction of the State court on such conflicting evidence.

APPEAL by the defendant, Abram Lipp, from a judgment of the Court of General Sessions of the Peace in and for the City and County of New York in favor of the plaintiff, rendered on the 3d day of February, 1905, convicting the defendant of the crime of grand larceny in the first degree.

*Adolph Hirsch Rosenfeld*, for the appellant.

*Robert C. Taylor*, for the respondent.

PATTERSON, J.:

Repeated and careful readings of the record in this case satisfy us that the judgment against the defendant entered upon the verdict of the jury convicting him of the crime of grand larceny in the first degree should not be allowed to stand. There are three counts in the indictment and the verdict was a general one. That indictment was based upon section 529 of the Penal Code, by which

App. Div.]

First Department, March, 1906.

it is enacted that "a person who willfully, with intent to defraud, by color or aid of a cheque or draft, or order for the payment of money or the delivery of property, when such person knows that the drawer or maker thereof is not entitled to draw on the drawee for the sum specified therein, or to order the payment of the amount, or delivery of the property, although no express representation is made in reference thereto, obtains from another any money or property, is guilty of stealing the same and punishable accordingly."

There were certain undisputed facts made to appear at the trial. They are that the defendant on the 29th day of July, 1904, purchased certain jewelry at the office of one Lindenborn, at 170 Broadway in the city of New York, and that the amount of his purchase was about the sum of \$2,700. The seller parted with the possession of the jewelry. Mr. Lindenborn was not present, but the transaction was had between one Price, his clerk, and the defendant, the latter giving in ostensible payment for the jewelry purchased, diamonds of the value of \$920.20, two checks, one for \$900 and the other for \$955.20, and \$2 in cash. Both checks were drawn upon a bank in Boston, Mass. The \$900 check was paid on presentation. The check for \$955.20 was dishonored. So far there is no dispute. The indictment was found and the prosecution conducted upon the theory of criminal intent on the part of the defendant in procuring property, part consideration for the purchase price of which was a worthless and dishonored check, the defendant not having the money in bank to meet it when it was presented. The People's case was made out principally by the testimony of one Sloman, who was a bookkeeper in the employ of Lindenborn. He testified that he was present at the transaction between Price and the defendant and he heard conversation between those persons. He swears that he heard the defendant say that he had \$2,200 in bank in Boston, thus representing that the checks were both good. The defendant's claim is that Price did not rely upon any representation; that none was made at the time the jewelry was purchased and that Price agreed to hold the checks and not at once forward them for collection. The learned recorder charged the jury in effect that it was immaterial whether representations were made or not, and left to them the determination simply of the question whether the defend-

ant by the presentation of a written order for money, knowing that he had no right to present such an order, and that there was no money in bank wherewith to meet it, used it as a means of obtaining property with intent to deprive the owner thereof, and stated that if they so found he committed the crime of larceny.

Price, who represented Lindenborn in the transaction, was not called as a witness. It is true that Lindenborn swears that Price was in St. Louis, but he left for that place only a week before the date of the trial. Sloman does not testify that he heard all of the conversation between Price and the defendant, but he does swear that Price, at the request of the defendant, agreed to hold back one of the checks until the subsequent Monday. His explanation is that the defendant said he did not wish to reduce his balance in bank to less than \$1,000. That was, in effect, giving a credit for the amount of the check thus to be held back. The defendant claims that by reason of the forwarding of the check to the bank in Boston in violation of the agreement to hold it back, it was dishonored and he was prevented from making arrangements with the bank for its payment and he also says that a customer to whom he expected to sell the jewelry purchased of Price would not take it.

It is manifest to us that the good faith of the prosecution of this defendant is seriously impeached by the record. When the check for \$955.20 was returned to Price dishonored, he entered at once into negotiations with the defendant to secure its amount. From all that appears, Price made no claim of any felonious or fraudulent conduct on the part of the defendant in buying the merchandise. He went to Maine to negotiate with the defendant respecting a transfer of real estate, took a deed of that real estate to secure the indebtedness and did so after conference with a lawyer in Maine concerning it. On August 11, 1904, Price wrote to the defendant as follows: "Upon receipt from you of a settlement of your account, I will deed back to you the property which you have this day deeded to me, or if I have disposed of same I will give you credit on *q/c* for such amount as I receive for the equity." The whole matter was adjusted as an indebtedness before this indictment was found. It was treated by Price as a simple indebtedness, and no suggestion that the transaction involved criminal responsibility was made.

App. Div.]

First Department, March, 1906.

This aspect of the case was not put before the jury, as we think should have been done. In view of the circumstances disclosed we are of the opinion that the defendant was entitled to an instruction to the jury which was requested, but which the court refused to give, namely, that "the conduct of the defendant towards the complainant, and his act immediately prior and subsequent to the transaction had on the 29th day of July, 1904, are circumstances which must be taken into consideration in determining the good faith of the defendant and his lack of criminal intent." To refuse that instruction, we think, was error. It is contended on behalf of the appellant that the alleged larceny was not committed in the city of New York. The defendant testified that the goods were sent to him by express and delivered to him at Boston, and hence argues that if a crime were committed, it was at Boston, and not within the jurisdiction of the courts of this State, but Sloman testified that the jewelry was actually delivered to the appellant at Lindenborn's office in the city of New York. The question of jurisdiction cannot be raised on this conflicting evidence.

Other and by no means trivial grounds for setting aside this judgment are urged by the appellant, but we consider it unnecessary to pass upon them. Suffice it to say that under the circumstances of this case and its peculiar facts, we think the defendant should have a new trial in furtherance of justice.

Judgment reversed and a new trial ordered.

O'BRIEN, P. J., McLAUGHLIN, LAUGHLIN and HOUGHTON, JJ., concurred.

Judgment reversed, new trial ordered. Order filed.

In the Matter of the General Assignment of GEORGE W. VENABLE and MOSES J. HEYMAN to ROBERT J. DEAN for the Benefit of Creditors.

THOMAS JANNEY and WESTERN NATIONAL BANK, Appellants; MARY A. EARLY, as Executrix, etc., of JOHN EARLY, Deceased, and MARY G. DEAN, as Administratrix, etc., of ROBERT J. DEAN, Deceased, Respondents.

First Department, March 9, 1906.

**Reference to take accounts of assignee for benefit of creditors—report filed after death of assignee should be returned to referee—election of administratrix and sureties of assignee to end reference.**

A report of a referee appointed to take and state the accounts of an assignee for the benefit of creditors, which is filed after the death of the assignee, is a nullity and should be returned to the referee to enable him to proceed with the reference on the substitution of the administratrix of the assignee, as required by section 10 of the General Assignment Act.

But such administratrix or the sureties of a deceased assignee, parties to the proceeding, may avail themselves of section 1019 of the Code of Civil Procedure and elect to end the reference, on the ground that the referee's report was not filed or delivered to the attorneys of one of the parties within sixty days from the time the case was finally submitted.

When notice of such election to end the reference is served, the court should refuse to reopen the reference or direct a further hearing before the same referee.

APPEAL by Thomas Janney and another from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 12th day of December, 1905, denying a motion that the report of a referee be returned to the referee, and the reference continued, and that the hearing therein be resumed.

*Abram I. Elkus*, for the appellants.

*Louis Marshall*, for the respondent executrix.

*John Yard*, for the respondent Mary G. Dean, as administratrix of Robert J. Dean, deceased.

App. Div.]

First Department, March, 1906.

INGRAHAM, J. :

It appears that George W. Venable and Moses J. Heyman made a joint assignment to one Robert J. Dean for the benefit of creditors; that the assignee proceeded with his trust and that subsequently proceedings were commenced to compel the assignee to account. In that proceeding a referee was appointed to take and state the accounts of the assignee. These hearings proceeded before the referee from November 21, 1899, to December 1, 1900, when the proceeding was submitted to the referee for determination. The referee completed his report and his opinion upon the questions submitted to him on June 6, 1902. On November 11, 1903, Robert J. Dean (assignee) died and on December 2, 1903, the referee delivered his report to certain of the creditors, and the same was on January 28, 1904, filed in the office of the clerk of the county of New York. After the referee's report was filed letters of administration on the estate of the assignee were issued and the proceeding revived, the administratrix being substituted in place of the assignee. Notice of the filing of the report was subsequently given to the administratrix and others who had appeared, when the administratrix filed an exception to the report upon the ground that the same was void because filed after the death of the assignee. An application to confirm the report having been made at the Special Term, it was denied upon the ground that the proceeding abated by the death of the assignee and this order was affirmed by this court (104 App. Div. 531). It was there held that the proceeding was suspended until it was continued by or against the representative of the deceased assignee, or his successor in interest, and that the referee, therefore, had no power to make and file a report against the original party who had died, and that the report filed after the death of the assignee was invalid. The position, therefore, at the time of the death of the assignee was that the proceeding had been tried before the referee and had been submitted to him for determination. Before he determined it, however, the assignee died, and the proceeding was then suspended until it was revived by the substitution of the personal representatives of the assignee. The report being a nullity, the question is now before the referee undisposed of, as if no report had been made. No order would seem to be necessary to enable the referee to proceed with the reference. The report being a nullity,

it has no business upon the files of the court; and it would seem to follow that the opinion of the referee, the minutes of the hearing and other papers filed by the referee are also not properly on the files of the court; and there would seem, therefore, to be no reasonable objection to allowing the party who filed them to withdraw them from the files. All of the proceedings prior to the death of the assignee, which included the submission of the case to the referee, were not invalidated either under the general provisions of the Code of Civil Procedure or under the General Assignment Act (Laws of 1877, chap. 466, as am'd. by Laws of 1878, chap. 318). Section 10 of that act provides that "In case an assignee shall die during the pendency of any proceeding under this act, or at any time subsequent to the filing of any bond required herein, his personal representative or successor in office, or both, may be brought in and substituted in such proceeding on such notice (of not less than eight days), as the county judge may direct to be given; and any decree made thereafter shall bind the parties thus substituted as well as the property of such deceased assignee." We held upon the former appeal that the proceedings before the referee were regular and valid up to the time of his making a report, and the position of the reference, unless it has been terminated, is that the case is before the referee for determination.

The notice of motion also asks that the reference should be continued and the hearing therein be resumed, and the reference proceed according to law as if no referee's report had been delivered and filed. In answer certain creditors presented to the court an affidavit from which it appears that on May 20, 1905, after an administratrix of Dean had been substituted, she served a notice upon the attorneys for the respective parties who had appeared in the proceeding that she "elects to and does end the reference heretofore ordered herein to Stephen H. Keating, Esq.," and a similar notice was served by the attorneys for Mary A. Early as executrix of the last will and testament of John Early, deceased, who was a surety upon the bond of the assignee and a party to the proceeding. This notice was served under section 1019 of the Code, which provides that a referee's written report must be either filed with the clerk, or delivered to the attorney for one of the parties, within sixty days from the time when the cause or matter is finally submitted; other-



App. Div.]

First Department, March, 1906.

wise either party may, before it is filed or delivered, serve a notice upon the attorney for the adverse party that he elects to end the reference. I think this provision applies to this reference. Section 20 of the General Assignment Act (as amd. by Laws of 1878, chap. 318) provides for an accounting by the assignee. By subdivision 9 of that section the court has power "to exercise such other or further powers in respect to the proceedings and the accounting therein as a surrogate may by law exercise in reference to an accounting by an executor or administrator." By section 20 of the act the court may, in its discretion, order a trial before a referee of any disputed claim or matter arising under the provisions of the act. Section 2546 of the Code, which authorizes a surrogate to appoint a referee to examine an account rendered and to hear and determine all questions arising upon the settlement of such an account which the surrogate has power to determine, makes applicable the provisions of the Code of Civil Procedure applicable to a reference by the Supreme Court.

Section 1019 of the Code provides that "Upon the trial by a referee of an issue of fact or an issue of law, or where a reference is made as prescribed in section one thousand and fifteen of this act, his written report must be either filed with the clerk or delivered to the attorney for one of the parties within sixty days from the time when the cause or matter is finally submitted, otherwise either party may, before it is filed or delivered, serve a notice upon the attorney for the adverse party that he elects to end the reference. In such a case the action must thenceforth proceed as if the reference had not been directed." Section 1015 provides that "The court may likewise of its own motion or upon the application of either party, without the consent of the other, direct a reference to take an account and report to the court thereon, either with or without the testimony, after interlocutory or final judgment or where it is necessary to do so for the information of the court, and also to determine and report upon a question of fact arising in any stage of the action, upon a motion or otherwise, except upon the pleadings." These sections authorize the court in which an action or proceeding is pending to direct a reference to take an account where it is necessary to do so for the information of the court. The accounting in this proceeding was within the provisions of these sections. It was

to take and settle the account of the assignee for the information of the court in distributing the assigned estate, and by subdivision 9 of section 20 of the General Assignment Act, and section 2546 of the Code, the provisions of the Code of Civil Procedure applicable to a reference in the Supreme Court are made applicable to such a reference. The proceeding was in the Supreme Court and I can see no reason why these two sections should not apply to such an accounting, the clear intent being to insure the prompt disposition of proceedings by a referee. It is as essential that an assignee's accounting should be properly settled as the trial of the issues in an action.

The case of *Bennett v. Pittman* (48 Hun, 612) does not apply. In that case there was a reference to take proof of facts in a proceeding to compel an attorney to pay over money to his client. Mr. Justice BARTLETT, in delivering the opinion of the court in that case, says: "If the referee had been directed to try an issue of law or an issue of fact or to take an account or to determine and report upon a question of fact in an action, the conclusion of the learned judge below would have been correct, for section 1019 of the Code of Civil Procedure permits a reference to be terminated in any of these cases where the report is not filed or delivered within sixty days from the time when the case or matter is finally submitted. But a reference to take proof in a special proceeding to compel an attorney to pay over money does not fall within the scope of this section and is not terminable in the manner therein prescribed."

Without passing upon the other questions presented, I think that the reference was terminated by the notice served, and that the court below was correct in refusing to reopen it and direct further proceedings before the referee.

It follows that the order appealed from must be affirmed, with ten dollars costs and disbursements.

O'BRIEN, P. J., PATTERSON, LAUGHLIN and CLARKE, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements. Order filed.

ADELAIDE CLIFFORD, Respondent, v. DENVER AND RIO GRANDE  
RAILROAD COMPANY, Appellant.

First Department, March 9, 1906.

**Evidence — privilege of communications to physician not waived by taking deposition of such physician — privilege of physician can only be waived in open court or by stipulation.**

Though the plaintiff in an action for damages for personal injuries has taken the deposition of a physician who examined her, it does not constitute a waiver of the privilege secured to such communications, and when such deposition is not offered in evidence by the plaintiff it is error to allow the defendant to introduce it over the objection of the plaintiff.

As section 834 of the Code of Civil Procedure now stands such privilege can only be waived in open court or by stipulation before trial.

By virtue of section 911 of the Code of Civil Procedure the competency of the evidence in such deposition does not arise until the trial.

McLAUGHLIN and LAUGHLIN, JJ., dissented, with opinion.

APPEAL by the defendant, the Denver and Rio Grande Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 15th day of June, 1905, upon the verdict of a jury for \$2,000, and also from an order bearing date the 12th day of June, 1905, and entered in said clerk's office, denying the defendant's motion for a new trial made upon the minutes.

*Rush Taggart*, for the appellant.

*David May*, for the respondent.

INGRAHAM, J. :

The plaintiff, a passenger upon the defendant's road, was injured on leaving the train at Alamosa, Col. She subsequently went to a hospital at Grand Junction, Col., where she remained four or five days, and while there was attended by a physician in his professional capacity. After the action was at issue a commission was issued on behalf of the plaintiff to take the testimony of this physician. His testimony was taken under this commission and the deposition was returned to the clerk of the county of New York. Upon the trial of the action the plaintiff did not read this deposition, but after the

plaintiff rested it was read by the defendant. The physician testified that he had resided at Grand Junction, Col.; that his occupation was physician and surgeon, attached to St. Mary's Hospital, in the city of Grand Junction; that he saw the plaintiff on the 28th of September, 1902, at the hospital; that he attended the plaintiff for four or five days. He was then asked: "If in answer to the last interrogatory, you answer yea, please state whether at the time you so attended the plaintiff, you made any examination of the plaintiff. If yea, please state when, and what such examination disclosed." The plaintiff objected to this question, which objection was sustained, and the defendant read other questions which involved the result of the witness' examination of the plaintiff. This testimony was all objected to, the objections were sustained and the defendant excepted. The jury found a verdict for the plaintiff, and from the judgment entered thereon the defendant appeals.

The substantial question upon this appeal is based upon the exclusion of this evidence, defendant claiming that the plaintiff waived her privilege under sections 834 and 836 of the Code of Civil Procedure by causing the witness' deposition to be taken under a commission. Section 834 of the Code provides that "A person duly authorized to practice physic or surgery, or a professional or registered nurse, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity." Section 836 provides that "The last three sections apply to any examination of a person as a witness unless the provisions thereof are expressly waived upon the trial or examination by the person confessing, the patient or the client. \* \* \* The waivers herein provided for must be made in open court, on the trial of the action or proceeding, and a paper executed by a party prior to the trial, providing for such waiver, shall be insufficient as such a waiver. But the attorneys for the respective parties may prior to the trial stipulate for such waiver, and the same shall be sufficient therefor."

The question as to the competency of this evidence is whether the plaintiff by procuring this testimony to be taken, waived the prohibition contained in section 834 of the Code.

The provisions of section 834 of the Code of Civil Procedure

prevent a physician from disclosing any information which he acquired in attending a patient in his professional capacity, and before the amendments of section 836 of the Code in 1899 and 1904 (Laws of 1899, chap. 53; Laws of 1904, chap. 331) took effect it had been held that after information of a privileged character had once been divulged in legal proceedings its further publication could not be suppressed (*McKinney v. Grand St., etc., R. R. Co.*, 104 N. Y. 352), and that where a party who had been attended by two physicians in their professional capacity at the same examination, both holding professional relations to him, calls one of them as a witness in his own behalf in an action in which the party's condition as it appeared at such consultation is the important question, to prove what took place or what the witness then learned, he thereby waives the privilege conferred by the statute and loses his right to object to the testimony of the other physician if called by the opposite party. (*Morris v. N. Y., O. & W. R. Co.*, 148 N. Y. 88.) Subsequently the Legislature, to regulate the waiver of this protection to a patient consulting a physician given by section 834 of the Code, amended section 836 of the Code in 1899 by adding the provision, "The waivers herein provided for must be made in open court on the trial of the action or proceeding, \* \* \*. But the attorneys for the respective parties may, prior to the trial, stipulate for such waiver and the same shall be sufficient therefor." By this amendment two methods were provided by which this prohibition could be waived. The first was a waiver in open court at the trial. The second, by a written stipulation signed by the attorneys for the respective parties to the action or proceeding. This provision was re-enacted by the amendment of 1904.

There was no written stipulation by the attorneys for the parties in this action, and to entitle the defendant to the testimony of a physician who had attended the plaintiff in his professional capacity, as to any information which he acquired in such attendance, there must be a waiver in open court upon the trial of the action. The record discloses no such waiver. It does appear that the plaintiff prior to the trial obtained a commission to examine the physician that attended her at the hospital at Grand Junction, Col., and in pursuance of that commission the physician was examined. It certainly cannot be said that this proceeding to take the testimony of

a witness by commission before the trial was a proceeding in open court on the trial of the action. After the testimony of this physician was taken under a commission and the deposition returned to the court, the plaintiff was not bound to read the testimony of the witness, and until she did read the deposition upon the trial it was not testimony in the action. The competency of testimony taken under a commission is to be determined by the court when it is read upon the trial. Section 911 of the Code provides that "A deposition taken and returned as prescribed in this article,† \* \* \* has the same effect, and no other, as the oral testimony of the witness would have; and an objection to the competency or credibility of the witness, or to the relevancy, or substantial competency, of a question put to him, or of an answer given by him, may be made, as if the witness was then personally examined, and without being noted upon the deposition." The question, therefore, as to the competency of the witness to testify as to any information acquired by him in attending the plaintiff was to be determined upon the trial when either party offered to read the deposition as evidence. The plaintiff not having read the deposition, when the defendant offered to read it, he made the physician his witness, and the competency of the witness to testify was to be determined by the trial judge. Nothing that the plaintiff had done before, and nothing that had happened in the course of the action, could be a waiver of the right to prevent a disclosure to the jury of the facts acquired by this physician in attending the plaintiff, except a waiver in open court or a written stipulation signed by the attorneys. There was no such written stipulation, and the plaintiff, instead of waiving the objection upon the trial, insisted upon it. The prohibition being absolute, unless waived, and the only method by which it could be waived, namely, a waiver in open court upon the trial, or a written stipulation signed by the attorneys, not appearing, we think the court was right in determining that the evidence was not competent.

The other objection taken by the defendant to the judgment is also untenable. I think there was evidence for the jury as to the condition of the plaintiff, and as to whether that physical condition was produced by the injury, and that this question does not require further discussion.

---

† Code Civ. Proc. chap. 9, tit. 3, art. 2.—[REP.]

The judgment and order appealed from should be affirmed, with costs.

O'BRIEN, P. J., and CLARKE, J., concurred; McLAUGHLIN and LAUGHLIN, JJ., dissented.

McLAUGHLIN, J. (dissenting):

The plaintiff on the 22d of September, 1902, was a passenger in one of the defendant's cars, and in going from it to the depot, where the car had stopped for the purpose of permitting her to get off, she tripped and fell, sustaining injuries which she alleges were due to the negligence of the defendant, and to recover damages therefor she brought this action.

Subsequent to the accident she was taken to a hospital, where she was attended by a physician, one Dr. Hanson. After issue had been joined in the action, upon her motion a commission was issued to and the testimony of Dr. Hanson was taken upon written interrogatories. At the trial, however, the commission having been returned, the plaintiff did not read the deposition or any part of it, and after she had rested and the defendant had entered upon its proof it sought to read the answers of the doctor to the direct and cross interrogatories, but the same were excluded upon the objection of plaintiff's counsel. The objection to the reading of such answers by the defendant was substantially upon the ground that they would disclose information acquired by the doctor while attending the plaintiff as a physician, and which was necessary to enable him to act in that capacity, and that the plaintiff had not waived her privilege of having such information kept secret under sections 834 and 836 of the Code of Civil Procedure. The defendant duly excepted to the ruling of the court excluding these answers.

The answers sought to be read would undoubtedly have disclosed information acquired by the physician while attending the plaintiff in a professional capacity, and which was necessary to enable him to act as such, and the ruling was right in excluding them (Code Civ. Proc. § 834) unless the plaintiff had waived her privilege of having such information kept secret. (Code Civ. Proc. § 836.) The section last cited provides that the waiver therein provided for must be "made in open court on the trial of the action or proceeding." The appellant contends there had been such waiver.

I am of the opinion that this contention is well founded. The application for the issuance of the commission was made in open court. It was for the purpose of procuring testimony to be read upon the trial. The application and the taking of the deposition, within the meaning of section 836 of the Code of Civil Procedure, were part of the trial itself. If I am right in this, then there had been a waiver in open court upon the trial of the action. The plaintiff, in asking for the issuance of the commission, consented that the information acquired by the physician while attending her in his professional capacity, and which was necessary to enable him to act in that capacity, might be made public, and her consent having been acted upon by the defendant, she was thereafter estopped from claiming the privilege which the statute gave her to have such information kept secret. It was upon her application that the deposition had been taken, and when she made the application she undoubtedly supposed that his deposition would be in her favor. That, however, was a chance which she took, and when such deposition had been taken, because it was not in her favor, she could not preclude the defendant (it having been put to the trouble and expense of obtaining it) from reading the same or so much of it as it desired, provided the part sought to be read was not subject to the objections provided for in section 911 of the Code of Civil Procedure.

In *McKinney v. Grand St., etc., R. R. Co.* (104 N. Y. 352) it was said that after information of a privileged character has once been divulged in legal proceedings, its further publication cannot be suppressed. There, defendant called as a witness a physician and proposed to prove by him the extent of injuries sustained by the plaintiff in a collision upon defendant's railroad. Upon a previous trial of the same action the same witnesses had been called by the plaintiff and required to testify fully as to all the facts bearing upon her physical condition as affected by the accident. Upon the second trial, however, plaintiff objected to the proposed evidence on the ground that the information acquired by the physician while attending plaintiff was privileged and could not, therefore, be admitted against her without her consent. The evidence was excluded, and the court, on appeal, reversed the judgment, and in doing so said: "The patient cannot use this privilege both as a sword and a shield



to waive when it enures to her advantage, and wield when it does not. After its publication no further injury can be inflicted upon the rights and interests which the statute was intended to protect and there is no further reason for its enforcement. The nature of the information is of such a character that when it is once divulged in legal proceedings it cannot be again hidden or concealed. It is then open to the consideration of the entire public and the privilege of forbidding its repetition is not conferred by the statute. The consent having been once given and acted upon, cannot be recalled, and the patient can never be restored to the condition which the statute, from motives of public policy, has sought to protect."

This case was cited with approval and followed in *Morris v. N. Y., O. & W. R. Co.* (148 N. Y. 88), where the court held that when a party who had been attended by two physicians in their professional capacity at the same examination or consultation, both holding professional relations to him, calls one of them as a witness in his own behalf, in an action in which the party's condition as it appeared at such consultation is the important question, to prove what took place or what the witness then learned, he thereby waives the privilege conferred by the statute and loses his right to object to the testimony of the other physician, if called by the opposite party to testify as to the same transaction.

It is true that the *McKinney* case was decided prior to the enactment of chapter 381 of the Laws of 1891, which amended section 836 of the Code of Civil Procedure, by providing that the waiver of the privilege must be made "upon the trial or examination;" and the *Morris* case, prior to the enactment of chapter 53 of the Laws of 1899, which further amended this section by providing that such waiver must be made "in open court on the trial of the action or proceeding," but the reasoning in both of them is just as applicable to the section since as it was before the amendments were made, when their purpose is considered and understood. The purpose of these amendments was to protect parties, their representatives and successors from waivers which might have been obtained through inadvertence or by a species of fraud and sharp practice. (*Holden v. Metropolitan Life Ins. Co.*, 165 N. Y. 13.) Both of the amendments were considered in *Schlotterer v. Brooklyn & New York*

*Ferry Co.* (89 App. Div. 508). There action was brought to recover damages for personal injuries, and on the trial a physician who had treated the plaintiff was called by the defendant without objection on the part of the plaintiff, whose counsel cross-examined him. The trial resulted in a nonsuit, and the plaintiff then brought a new action against the defendant to recover for the same cause of action, and it was held that plaintiff was precluded from objecting that the physician was incompetent to testify. Mr. Justice JENKS, in delivering the opinion, said: "The letter of the statute does not require a construction which is opposed to the reason of the rule as laid down in *McKinney's Case* (*supra*). The purpose of the statute is to cover the relation of physician and patient with the cloak of confidence. But the purpose is to save the patient from possible humiliation or distress, not to enable him to win a lawsuit. Now, if the patient once permit the physician to testify, there is no longer any reason at any time for excluding competent testimony under the plea of public policy. If the patient once voluntarily renounce the protection of the statute, his waiver is everlasting and irrevocable."

Under the foregoing authorities, as well as upon reason, it must be held that the plaintiff, by procuring the issuance of the commission and the taking of the deposition of the physician, waived the privilege which the statute gave her; that such waiver was made in open court, upon the trial of the action, within the meaning of section 836 of the Code of Civil Procedure.

Another question is raised by the appellant, which is that the evidence is insufficient to sustain a finding that the serious injuries of which the plaintiff complains — diaphragmatic pleurisy and prolapsed ovary — were caused by the accident. This would require consideration, but inasmuch as there must be a new trial, and there may be more evidence bearing upon this subject, I do not deem it necessary at this time to pass upon it.

The judgment and order appealed from, therefore, should be reversed and a new trial ordered, with costs to appellant to abide event.

LAUGHLIN, J., concurred.

Judgment and order affirmed, with costs. Order filed.

App. Div.]

First Department, March, 1906.

**BERNARD W. WEBEL, Appellant, v. FRANK A. KELLY, Respondent.**

First Department, March 9, 1906.

**Will construed — devise of life interest with contingent remainders over — when life tenant cannot compel specific performance by vendee of contract of purchase.**

When a will directs the executor to hold specific real estate in trust and invest the income until an adopted son attains the age of twenty-one years, said property not to be sold during the lifetime of said adopted son, but to be conveyed to said son when he arrives at the age of twenty-five years, "to be held by him as follows: In case of my said adopted son departing this life before me or \* \* \* after my death without leaving lawful issue, then I give all my property, real and personal, \* \* \* to my nephews \* \* \* and my niece \* \* \* and to their children," the remainder to the nephews in case of the death of the adopted son is made part of the trust, and said adopted son, though surviving the age of twenty-five years, and holding under a conveyance from the executor, is only a life tenant and the estate is charged with a contingent remainder to his issue, if any, and if not, then with remainders to said nephews and niece or their children.

Hence, said adopted son cannot specifically enforce the contract of a third person to purchase said lands.

HOUGHTON and McLAUGHLIN, JJ. (concurring in result only): The will should be construed to give the plaintiff absolute title, but as there are doubts as to this, the vendee should not be required to perform specifically.

APPEAL by the plaintiff, Bernard W. Webel, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 11th day of October, 1905, upon the decision of the court rendered after a trial at the New York Special Term.

*William H. Klinker*, for the appellant.

*August C. Nanz*, for the respondent.

INGRAHAM, J.:

The action was for specific performance of a contract for the sale of real property by which the plaintiff agreed to sell to the defendant a certain piece of property in Forty-third street, in the city of New York, of which property Henry Bernard Webel was seized at the time of his death. He left a last will and testament in which, after certain bequests, he provided: "All the balance of

my real estate, including my house and lot No. 35 West 43rd street (the property in question) I direct my executor to hold in trust and which I specially direct shall not be sold during the lifetime of my said adopted son, but that my executor collect all the rents, issues and profits thereof, and after payment of taxes, assessments and other necessary expenses, I direct the same to be invested in the same manner and the interest devoted to the said purposes as above specified and payable in the same manner in point of time to my said adopted son after he shall arrive at the age of twenty-one years and until he shall arrive at the age of twenty-five years. Next, on the arrival of my said adopted son at the age of twenty-five years, I direct my said executor to convey all my real estate I may so own unsold and all securities and other property moneys, principal and interest to my said adopted son to be held by him as follows :

“IV. In case of my said adopted son departing this life before me or in case of his so departing this life after my death without leaving lawful issue, then I give all my property, real and personal and of every kind to my nephews Louis Webel, Charles Webel, and my niece Caroline Webel, sons and daughter of my deceased brother Lewis, to be owned by them equally, share and share alike, and to their children, *per stirpes* and not *per capita*, and in case of the death of my said adopted son before the age of twenty-five years, without such issue, I hereby make it a part of the trust that my executor shall see this last provision of my will carried into effect, and convey said property above named to my said nephews and niece.”

The plaintiff was the adopted son of the testator. When he arrived at the age of twenty-five years the executor and trustee conveyed the property to the plaintiff. The conveyance recited that it was by virtue of the power and authority to him given by the foregoing will, and conveys the estate that the testator had at the time of his decease and the estate which the trustee had power to convey or dispose of. The estate to which the adopted son would be entitled under this clause of the will was “to be held by him as follows;” that was, in case of his departing this life after the death of the testator, without leaving lawful issue, the property was to go to the testator’s nephews and niece. There was no

App. Div.]

First Department, March, 1906.

general devise of the property to the plaintiff. His sole title to it was through a conveyance from the trustee, under the direction of the will, by which the trustee was directed to convey the property to the plaintiff upon his arrival at the age of twenty-five years, to be held by the plaintiff under this clause of the will. I am inclined to think that this gave to the plaintiff a life estate in the property, with remainder to his issue. The trustee made provision for the support of the plaintiff prior to his arrival at the age of twenty-one years. He then gives to the plaintiff the total income of the property while he is between twenty-one and twenty-five years of age. During that time the trustee is to remain in possession of the property, paying to the plaintiff the income. When he arrives at the age of twenty-five years provision is made for a conveyance of the property by the trustee to the plaintiff, "to be held by him as follows," and then comes the provision that if the plaintiff should die before the testator, or after the death of the testator without lawful issue, there should be a remainder over. This remainder over is to happen in the event of the death of the plaintiff after the testator's death, and is not limited to his dying before he reaches the age of twenty-five years, as by the 3d clause the plaintiff would have no title to the property until he arrived at the age of twenty-five years, and the property so to be conveyed was thereafter to be held by the plaintiff as provided for in the 4th clause of the will.

The evident intent of the testator was to provide that this property should go to his adopted son, the plaintiff, and his children; but if he left no children, then the property should go to his nephews and niece. I think, reading the 3d and 4th clauses together, that the plaintiff took a life estate in the property with a remainder over to his issue; but in the event that he died without issue, there was a limitation over by way of executory devise to his nephews and niece; that this was not dependent upon the plaintiff's dying without issue prior to his arriving at the age of twenty-five years, for such a contingency is provided for in the same clause of the will, as, in that event, namely, the death of the plaintiff before arriving at the age of twenty-five years, the testator directs that his executor shall enforce the provision and convey the property to his nephews and niece. This intention is strengthened by the provision in the 3d clause of the will that the property should

not be sold during the life of the plaintiff. It can be effectuated by holding that the plaintiff took a life estate in the property only.

This construction of the will is sustained by *Vanderzee v. Slingerland* (103 N. Y. 47). In that case the testator's son Cornelius entered into possession of the property under an express devise thereof contained in the will of the testator. By that will the testator provided that all of his real estate "I devise to my son Cornelius, subject to the proviso hereinafter contained." The will then made certain charges upon the property, consisting of annuities to his wife, daughters and grandchildren, and then provided: "In conclusion, my will is that if my son Cornelius dies without issue, that then the estate herein devised to him shall go to my grandchildren hereinafter named." It was held that this clause referred to the death of his son Cornelius after the death of the testator; that in that event, on the death of the testator the grandchildren took a contingent interest under the will by way of executory devise which, on the death of Cornelius without issue, was converted into a fee in them, thereby displacing and subverting the conditional fee before that time vested in Cornelius.

I think, therefore, that the plaintiff could not give a good title to the property, and that the judgment should be affirmed, with costs.

O'BRIEN, P. J., and CLARKE, J., concurred.

HOUGHTON, J. (concurring):

I am of the opinion that the plaintiff has an absolute title to the premises in controversy.

He was thirteen years of age when his adopted father made the will in question. The dominant idea running through the will is that the plaintiff should be cared for by the executor named until he should arrive at the age of twenty-five years, and that if he died prior to that time without issue, then that the property should go elsewhere.

The will is inartificially drawn and words are used quite regardless of their meaning. It is true that it provides that the premises No. 35 West Forty-third street shall not be sold during the lifetime of the plaintiff, but following that provision and in a new sentence beginning "Next," it is provided that "on the arrival of my said adopted son at the age of twenty-five years, I direct my said execu-

App. Div.]

First Department, March, 1906.

tor to convey all my real estate I may so own unsold, and all securities and other property, moneys, principal and interest, to my said adopted son, to be held by him as follows." Little significance, it seems to me, should be given to the words "to be held by him as follows," for nothing follows as to the manner in which he shall hold, but only a further clause of the will, denominated "Fourth." The direction to the executor to convey of course is equivalent to an absolute devise of the real estate and gift of securities. In the 4th clause it is provided that in case the plaintiff shall die before the testator's death, "or in case of his so departing this life after my death, without leaving lawful issue," then all real and personal property is given over to the children of a deceased brother. But directly following the statement that they shall so take *per stirpes*, and not *per capita*, is the language, "and in case of the death of my said adopted son before the age of twenty-five years, without such issue, I hereby make it a part of the trust that my executor shall see this last provision of my will carried into effect and convey said property above named to my said nephews and niece." This language indicates that the testator meant that the property should so pass to his nephews and niece in case the plaintiff should die without issue before he arrived at the age of twenty-five years, and meant nothing more. The language last quoted is the last used by the testator on that subject, and is in accordance with the last provision of the 3d paragraph of the will.

It seems to me, too, that considerable significance should be given to the direction to the executor to "convey" to the nephews and niece. The executor was commanded to look after the property and pay the income to the plaintiff until he should arrive at the age of twenty-five years. The testator assumed that his executor, whom he also made testamentary guardian of the plaintiff, would live until that time arrived; but it is quite improbable that he also considered that his executor would outlive the plaintiff, and so be able to know whether he died without issue and thereby be in position to convey the real property to the substituted devisees, and turn over to them the personal property which had originally come to his hands.

The construction to be given to the will involves the title to the entire estate as well as to the premises in question, and neither the

First Department, March, 1906.

[Vol. 111.]

executor of the will nor the substituted legatees are parties hereto. It would be much more satisfactory to construe the will in a direct proceeding for that purpose, in which all persons interested should be made parties and be heard as to their respective rights.

However, I agree that there is a doubt concerning the plaintiff's title, and that the defendant ought not to be compelled to specifically perform, and, therefore, concur in an affirmance of the judgment.

McLAUGHLIN, J., concurred.

Judgment affirmed, with costs.

---

GODFREY GOLDMARK, Respondent, v. U. S. ELECTRO-GALVANIZING COMPANY, Appellant.

First Department, March 9, 1906.

**Deposition — examination of officer of corporation — Code of Civil Procedure, §§ 870, 872, 873, and rule 82 construed — matters not a defense to such application — laches no bar.**

Section 870 of the Code of Civil Procedure, as amended by Laws of 1904, chapter 696, allows a party to an action to take the deposition of any party to such action during as well as before trial.

Rule 82 of the General Rules of Practice in requiring the applicant to show, in conformity with subdivision 4 of section 872 of the Code of Civil Procedure, that the examination of the party is "material and necessary," is designed to prevent an abuse of such examination by using it for ulterior or improper purposes.

Code of Civil Procedure, sections 870, 872, 873, and court rule 82 construed.

When an applicant has complied with the above sections of the Code and with said rule, it is no answer to his application to show that he can subpoena the witness sought to be examined, or that the witness or defendant will stipulate to appear at trial, or that the evidence sought can be obtained through other persons.

On such application there can be no question of laches, as by the amendment to section 870 of the Code of Civil Procedure such examination can be had during trial.

APPEAL by the defendant, the U. S. Electro-Galvanizing Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of



App. Div.]

First Department, March, 1906.

New York on the 30th day of January, 1906, denying the defendant's motion to vacate an order for the examination before trial of the president of the defendant company.

*David Gerber*, for the appellant.

*Theodore L. Frothingham*, for the respondent.

INGRAHAM, J. :

This action was to recover commissions earned by the plaintiff under an agreement with the defendant, a foreign corporation, with a place of business in the county of Kings, in the city of New York. The action is at issue and on the calendar ready for trial. On January 10, 1906, the plaintiff presented an affidavit to a justice of the Supreme Court, and upon that affidavit an order was granted requiring the president of the defendant to appear and be examined pursuant to section 873 of the Code of Civil Procedure, and to produce certain books of the corporation for use upon the oral examination. The defendant moved to vacate this order. This motion was denied, and the defendant appeals.

Prior to May 9, 1904, section 870 of the Code of Civil Procedure gave to a party to an action pending in a court of record, other than the courts therein excepted, the right to take the deposition of any party to the action "at any time before the trial." (See Laws of 1878, chap. 299.) By chapter 696 of the Laws of 1904 this section of the Code was amended by giving a party the right to take such a deposition during as well as before the trial. So that, as the provision now stands, any party to the action has the right to take the deposition of a party at any time before or during the trial. Section 872 of the Code provides that, if the action is pending in the Supreme Court, a person desiring to take such a deposition must present to a justice of the Supreme Court, or to a county judge, an affidavit setting forth the names and residences of all the parties to the action, whether or not they have appeared, with the name and the residence or office address of the attorney, the nature of the action, and the substance of the judgment demanded, and if a defense has been interposed, the nature of the defense, the name and residence of the person to be examined, and that the testimony of such person is material and necessary

for the party making such application, or for the prosecution or defense of such action; and that if the party sought to be examined is a corporation, the affidavit shall state the names of the officers or directors thereof, or any of them whose testimony is necessary and material, or the books and papers as to the contents of which an examination or inspection is desired, and that the order to be made in respect thereto shall direct the examination of such persons and the production of such books and papers. Section 873 provides that the judge to whom such an affidavit is presented must grant an order for the examination.

Rule 82 of the General Rules of Practice provides that the affidavit shall specify the facts and circumstances which show, in conformity with subdivision 4 of section 872 of the Code, that the examination of the person is material and necessary. The appellant does not pretend that the affidavit upon which the order in this case was granted does not comply with section 872 of the Code and rule 82 of the General Rules of Practice, but it presented to the court below and to us on this appeal various reasons why the deposition should not be taken, and we think it proper to again state the rules which govern applications of this kind. The rule that the affidavit must state the facts and circumstances to show that the deposition of the proposed witness is material and necessary to the party making the application, is intended to prevent an abuse of the permission to examine an adverse party, so that a party to an action will not be allowed to examine his opponents for an ulterior or improper purpose.

It is not an answer to such an application to say that the party making the application can subpoena the witness sought to be examined on the trial. Nor is a stipulation by a witness or a defendant that such a witness or defendant would appear for trial an answer to such an application. The Code expressly provides that the deposition is to be taken either before or during the trial. The object is to obtain testimony of an adverse party before the trial so that it can be used at the trial. Just what such an adverse party will swear to cannot be ascertained until the deposition is taken, and until the deposition is taken, in a condition to be read at the trial, a party cannot tell whether the evidence of the proposed witness would be sufficient to prove the particular facts desired to be

App. Div.]

First Department, March, 1906.

proved, or whether he must procure other evidence of the fact. Nor is it an answer to such an application that the party making it can procure the evidence from other persons than of the person whose deposition is required. The statute does not require that it shall appear that the fact sought to be proved cannot be proved by other witnesses, but it authorizes a party to take the deposition of his opponent where his testimony can prove the fact which he desires to establish. Where an issue of fact is presented to be determined upon the trial of the action, and where it appears that a party to the action has knowledge of facts which are material in the determination of that issue, either party to the action under these provisions of the Code is entitled to examine such a party and have his deposition taken for use at the trial.

It is quite useless to attempt to reconcile the opinions in the various cases that have discussed this question. There are expressions in many of the opinions which are inconsistent with this conclusion, but we think the plain provision of the Code authorizes a party to an action to obtain the evidence of his opponent as to facts which are within his opponent's knowledge, leaving those questions to be disposed of as to which there is a dispute. The right given by these sections of the Code is subject to abuse, and it is the duty of the court to prevent the abuse of its processes, but where there is no doubt of the good faith of a party to a litigation seeking to establish a fact essential to his cause of action by the testimony of his opponent, I can see no reason why a party is not entitled to have the knowledge of his opponent as to the fact which he wishes to establish put upon record so that the evidence of that fact would be available to either party to the action when the trial takes place. It is not the duty of a court of justice to suppress the facts or throw obstacles in the way of either party in establishing the truth, and where a party to the action has presented to a justice of the Supreme Court an affidavit complying with section 872 of the Code and the facts and circumstances are stated which show that the testimony of the person whose deposition is proposed to be taken is material and necessary for the party making the application for the prosecution or defense of the action, there is no reason why the examination should not be allowed and the evidence preserved in

such a form as to be available to either party upon the trial of the action.

There is no question of laches upon such an application. By the amendment of the Code made in 1904 the deposition may be taken at any time before or during the trial, and this, I suppose, means just what it says and the deposition may be taken at any time before or during the trial.

The order appealed from should be affirmed, with ten dollars costs and disbursements.

O'BRIEN, P. J., McLAUGHLIN, CLARKE and HOUGHTON, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

---

HARRY T. GAUSE, Respondent, v. COMMONWEALTH TRUST COMPANY  
OF NEW YORK, Appellant.

First Department, March 9, 1906.

**Complaint—action against syndicate on guarantee to sell securities—when damage sufficiently alleged—complaint on breach of contract not demurrable for failure to allege damage—contract construed.**

The complaint set out a contract with the defendant, a selling syndicate organized to sell stock of the United States Shipbuilding Company, whereby the syndicate agreed in substance to sell securities owned by the plaintiff within one year, at a price not less than that specified therein, and undertook that the plaintiff should receive at the end of the year the price stipulated; that the defendant requested the plaintiff to hold the securities in his possession, but at the defendant's use and disposal, which the plaintiff did, and repeatedly tendered the same to the defendant. etc. The complaint further alleged, by way of damage, that "the defendant failed to make any sales of the securities aforementioned as plaintiff has been informed and believes. Certainly the defendant failed to account to the plaintiff as provided in the agreement." Meanwhile the securities had become substantially valueless "to plaintiff's damage in the sum of," etc.

On demurrer to the said complaint as failing to show damage,

*Held*, that the damage sustained by the plaintiff was the difference between the value of the securities at the end of the year, when the defendant agreed to pay, and the minimum price at which the defendant agreed that they should be sold;

App. Div.]

First Department, March, 1906.

That the plaintiff's damage was sufficiently alleged;

That as the plaintiff was in any event entitled to nominal damages for the breach of contract the complaint was not demurrable, though no damage were alleged;

That, though the contract set forth contained a provision that the same was to become null and void on a date named (the date for which payment to plaintiff was set), the liability of the defendant was not affected by said clause, as to hold otherwise would be to nullify the whole agreement between the parties.

APPEAL by the defendant, the Commonwealth Trust Company of New York, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, bearing date the 26th day of October, 1905, and entered in the office of the clerk of the county of New York upon the decision of the court, rendered after a trial at the New York Special Term, overruling the defendant's demurrer to the amended complaint.

*Charles Edward Souther*, for the appellant.

*Howard Taylor*, for the respondent.

INGRAHAM, J. :

To the original complaint in this action the defendant demurred, which demurrer was sustained by this court (100 App. Div. 427). In pursuance of the leave granted the plaintiff amended the complaint, to which the defendant again demurred, which demurrer was overruled, and the sufficiency of the amended complaint is now before us.

The action is brought upon a contract, a copy of which is annexed to the complaint. By that contract the defendant was the party of the first part and the plaintiff the party of the second part. It recites that "It is the mutual desire of the parties hereto that the securities of the United States Shipbuilding Company shall be sold to the best advantage, both parties being interested in same;" that a selling syndicate had been formed to arrange for such sales, and for other purposes, under an agreement providing for the deposit of all of said securities of the United States Shipbuilding Company, except those of the plaintiff, with the defendant, for such purposes, and that both parties would in good faith co-operate with the said syndicate in furthering such object and that the agreement was intended to be an aid to the same. It was then agreed that the

plaintiff should deposit with the defendant all of his bonds and shares of preferred and common stock of the United States Shipbuilding Company under the terms and conditions of the agreement; that the defendant would use and dispose of said securities of the plaintiff as in its judgment should be necessary to further the purposes of the syndicate, and in so doing, would do whatever was necessary to insure equal benefits to the plaintiff *pro rata* to his holdings of said securities that were enjoyed at any time by the vendors who should be or become parties to the agreement with said syndicate in connection with the sale and disposition of said securities or the proceeds of the sale of the same, and it (defendant) "hereby guarantees to the party of the second part (plaintiff) the sale of all of his said securities on or before August 25, 1903, whether through the efforts of said syndicate or otherwise, and the party of the first part agrees to account to the party of the second part, on or before the 25th day of August, 1903, and that the prices thereof shall be on a basis which will realize to the party of the second part not less than 95 per cent of the par value of the bonds and 68 per cent of the par value of the said preferred stock and 25 per cent of the par value of the said common stock, less brokerage expenses, as hereinafter stated, and the party of the first part hereby agrees to pay to the party of the second part the interest on the bonds as and when received from the United States Shipbuilding Company during the period of this agreement; and in case of their sale or any of them during the period of this agreement, and if under such circumstances it elects to retain the proceeds of the sale of the same, under the provisions hereof, until the final accounting hereunder, the party of the first part agrees to pay to the party of the second part the accrued interest on such bonds as may be sold up to the dates of their sale, and also interest on the proceeds of the sale of same, at the same rate that the bonds would have earned if same had not been deposited under the terms of this agreement, said payments of interest to be made January 1st and July 1st, 1903, if this agreement is not sooner terminated, but at its termination at any time payment is to be made in full."

The agreement further provides that the defendant is accorded the exclusive right to sell the said securities of the plaintiff during the period of the agreement, and that the defendant shall have the

App. Div.]

First Department, March, 1906.

authority from time to time, and at any time, to pay the usual brokerage and brokers' expenses, if any, in connection with the sale of the securities of the plaintiff; and that "No obligation or liability in addition to those herein expressed shall be implied against the said party of the first part; it being the spirit and intent of this agreement that said securities are deposited as named under a guaranty of sale at not less than the minimum figures hereinbefore mentioned, and all proceeds of sales are to be accounted for at the figures at which such sales shall be made, and the same with all incidental net profits in connection with the same."

In construing this agreement, in connection with the allegations of the original complaint, this court held: "It is clear that under the contract alleged in the complaint the defendant had no right to become the purchaser of these securities. It undertook to sell the same and was bound to sell for the best price that could be obtained, and if a higher price than that named in the agreement had been received upon their sale the defendant would have been required to account for the same to the plaintiff, and its obligation under the contract would not have been satisfied by the mere payment of the sum mentioned in the complaint. \* \* \* The cause of action, if any, alleged was not a breach of a covenant to pay a certain sum of money, but to perform a certain duty, namely, to sell these securities, and a covenant that they would realize a certain sum at least. There were no allegations whatever contained in this complaint tending to show that by reason of the breach of this covenant of sale, the plaintiff has suffered any damage whatever." (100 App. Div. 429.)

Accepting this construction of the contract, as we must on this appeal, the question is whether the plaintiff has now alleged facts which show that by reason of the failure of the defendant to sell these securities within the year, the plaintiff has sustained damage. There can be no question but that under this agreement the defendant agreed to sell these securities, owned by the plaintiff, within one year from the date of the agreement at a price not less than that specified therein, and undertook that the plaintiff should receive at the end of the year the price specified. The complaint alleges that at the time of the making of this agreement the securities themselves were not actually engraved and made out, but that

as soon as this was accomplished, to wit, in January, 1903, the plaintiff notified the defendant that the securities were in his possession, and offered to deposit them bodily with the defendant pursuant to the terms of the agreement; that the defendant requested that the plaintiff hold them in his possession, but at its use and disposal, subject to the terms of the agreement, and this the plaintiff did; that the securities had been, ever since the date of the agreement and during the entire period thereof, at the disposal of the defendant, held for its use, at its request and subject to its order; and that the plaintiff repeatedly tendered the securities to the defendant prior to August 25, 1903, and since that date had been and was then ready and willing to turn the same over to the defendant, and offers to do so. This allegation is admitted by the demurrer. The plaintiff still having the possession of the securities, however, and the action being in form one to recover the damages sustained by the plaintiff in consequence of a breach of the agreement by the defendant to sell the securities at a price not less than that fixed in the agreement before August 25, 1903, it is obvious that the damages that the plaintiff sustained in consequence of a breach of this agreement by the defendant was the difference between the value of the securities on August 25, 1903, and the minimum price at which the defendant agreed that they should be sold. Upon this point the complaint alleges that "The defendant failed to make any sales of the securities aforementioned, as plaintiff has been informed and believes. Certainly the defendant failed to account to the plaintiff as provided in the agreement. It has never accounted to the plaintiff in regard to any of the securities, nor paid nor caused to be paid to the plaintiff any sum whatever for or on sale of the same," and that the above has been to the plaintiff's damage in the sum of \$404,630, with interest from August 25, 1903.

It is a familiar rule that where a contract and a breach thereof by the defendant is alleged, the plaintiff is at least entitled to nominal damages; and although a complaint should fail to allege damages, the plaintiff being entitled to nominal damages, the complaint is not demurrable. It is in substance alleged that on the 25th day of August, 1903, the securities which the defendant undertook to sell at a price named had become valueless, and that thereby the



App. Div.]

First Department, March, 1906.

plaintiff had sustained damage to an amount specified. This, upon demurrer, is clearly a sufficient allegation of damage to entitle the plaintiff upon facts conceded by the demurrer to a judgment for the amount specified. The learned counsel for the defendant, however, contends that by virtue of the 7th clause of the agreement after the 25th day of August, 1903, there was no obligation upon the defendant. That clause is as follows: "This agreement and all it contains shall become null and void on August 25, 1903, or at any time prior thereto coincident with the sale of and settlement for all of the said securities of the party of the second part or the termination of the said syndicate by the fulfillment of its agreement with the other vendors and underwriters of the said securities." This clause must be read in connection with the balance of the agreement. By the agreement the defendant was not required to account to the plaintiff for the proceeds of the securities sold by it until August 25, 1903. If the defendant's contention is sustained, then no matter what price the defendant had received from the sale of the plaintiff's securities prior to that time, it would be under no obligation to account for them. It is quite clear that what was intended was that the defendant agreed to sell the securities prior to August 25, 1903, and to account to the plaintiff for the proceeds. It further guaranteed that it would sell the securities at a price named within that period. Thus, on the 25th day of August, 1903, the defendant would either have in its hands the proceeds of the sale of the securities named or would be under an obligation to pay to the plaintiff the amount which it had guaranteed the securities would be sold for prior to the 25th day of August, 1903. Its obligation to the defendant would, therefore, become fixed at that date. It would be under no obligation to hold the securities and sell them at a subsequent period, although they should then be salable at a higher price. It was certainly not intended to relieve the defendant from its obligation to account to the plaintiff for the value of the securities that it had sold, or for the amount that the securities would realize at the price named which the defendant had guaranteed should be realized prior to that time. While the intention of the parties is not clearly expressed, there is, I think, no doubt of what was intended. The defendant was to sell the securities prior to August 25, 1903, at a price not less than that named in the con-

tract. If the securities were sold, it was to account to the plaintiff for the amount realized. It, however, guaranteed that it would sell the securities at the specified prices prior to that date, and if on that date the securities had not been sold, the plaintiff would be entitled to recover for a breach of its contract. On the 25th day of August, 1903, the contract was to become null and void, but the obligation of the defendant to the plaintiff, as fixed upon that date, was not affected by this clause. In construing contracts of this kind, we are to ascertain the intention of the parties and give it due effect; and to hold that this 7th clause of the agreement terminated all liability of the defendant on the contract on the 25th day of August, 1903, would in effect nullify the whole arrangement between the parties, a result which certainly was not contemplated by either party when the agreement was made.

I think that the complaint set forth a good cause of action and that the demurrer was properly overruled.

It follows that the judgment appealed from should be affirmed, with costs, with leave to the defendant to withdraw the demurrer and answer within twenty days on payment of costs in this court and in the court below.

O'BRIEN, P. J., PATTERSON, LAUGHLIN and CLARKE, JJ., concurred.

Judgment affirmed, with costs, with leave to defendant to withdraw demurrer and to answer on payment of costs in this court and in the court below. Order filed.

---

MORRIS WOLINSKY, Appellant, v. MORRIS OKUN, Respondent.

First Department, March 9, 1906.

**Lis pendens** — when not canceled in action to set aside conveyance — plaintiff's right to relief not determined on affidavit — when deposit of money may be made.

When the complaint asks that a deed whereby the plaintiff conveyed to his copartner his undivided half interest in real estate be vacated and set aside, a *lis pendens* filed by the plaintiff should not be canceled, as adequate relief cannot be granted to the plaintiff by the deposit of money or an undertaking by the defendant under section 1671 of the Code of Civil Procedure.

App. Div.]

First Department, March, 1906.

The plaintiff's right to the relief demanded cannot be determined upon affidavits used on a motion to cancel a *lis pendens*, but the relief demanded in the complaint is controlling on such motion.

A deposit of money or an undertaking by the defendant is adequate relief under section 1671 of the Code of Civil Procedure only when it is apparent that the only relief to which the plaintiff would be entitled would be a judgment for a sum of money which would be a lien upon the lands.

APPEAL by the plaintiff, Morris Wolinsky, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 25th day of October, 1905, granting the defendant's motion to cancel a *lis pendens* upon filing an undertaking under the provisions of section 1671 of the Code of Civil Procedure.

*Paul M. Abrahams*, for the appellant.

*Morris Meyers*, for the respondent.

INGRAHAM, J. :

The complaint alleges that the plaintiff and defendant were copartners, engaged in buying and selling real estate in the city of New York under a contract filed in the office of the register of the county of New York; that certain real property described in the complaint was purchased by the plaintiff and defendant for their joint benefit; that by certain false and fraudulent representations made by the defendant the plaintiff was induced to convey to the defendant the plaintiff's undivided half interest in the property so purchased; that the defendant had contracted for a sale of said property, and the plaintiff demands judgment that the deed of conveyance of the plaintiff's undivided half interest in the property to the defendant be vacated and set aside and the parties restored to the same position that they occupied before the making and delivery of the conveyance.

It is evident that the judgment demanded by the plaintiff will, if granted, restore to him an undivided half interest in the property described. While it would appear from the affidavits submitted on this motion that it is doubtful whether the plaintiff could succeed in establishing his cause of action, he has the right to have that question determined upon the trial and not upon affidavits. A deposit of money in court or the giving of an undertaking by the

defendant would not protect the plaintiff in case he should recover judgment, for by vacating the notice of pendency of action the defendant can convey the property and render any judgment which would vest the plaintiff with a half interest therein ineffectual. Section 1671 of the Code of Civil Procedure provides that, except as therein otherwise provided, the court may entertain an application to cancel a notice of pendency of action where it shall appear to the court upon motion that adequate relief can be secured to the plaintiff by a deposit of money or, in the discretion of the court, by the giving of an undertaking; but this does not apply to an action where the relief specifically demanded is for the conveyance to the plaintiff of specific real property. The nature of the action must be determined by the complaint, and where the complaint demands a judgment which would insure to the plaintiff the specific real property therein described, the case is not one in which adequate relief can be secured to the plaintiff by a deposit of money or the giving of an undertaking, unless from the established facts appearing upon the application it is apparent that the only relief which the plaintiff would be entitled to would be a judgment for a sum of money which would be a lien upon the property. Where there is an issue presented which involves the right of the plaintiff to specific real property, adequate relief cannot be secured to the plaintiff by a deposit of money or by the giving of an undertaking, and the notice of pendency of action should not be canceled.

We think that in this case, as the judgment demanded by the plaintiff, if granted upon the trial, would be something more than the recovery of a sum of money, the notice of pendency of action was improperly canceled, and the order appealed from should be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

O'BRIEN, P. J., PATTERSON, LAUGHLIN and CLARKE, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs. Order filed.

App. Div.]

First Department, March, 1906.

HARRY L. WILLIAMSON, Respondent, v. LEWIS V. F. RANDOLPH, as President of the CONSOLIDATED STOCK AND PETROLEUM EXCHANGE OF NEW YORK, Appellant.

First Department, March 9, 1906.

**Trial — suit in equity — new trial ordered when trial justice designated to Appellate Division before signing and filing decision — cause cannot await expiration of such designation — court cannot compel submission of case on former testimony.**

Although a justice of the Supreme Court has announced his decision in an equity case before he is designated to the Appellate Division, he is thereafter disqualified from acting further in the case by section 2, article 6 of the New York Constitution, and cannot sign and file his decision. Under such circumstances there must be a new trial.

*It seems*, that such would not be the case if his term in the Appellate Division had expired and no motion had been made in the meantime for a new trial.

When such trial judge is appointed to the Appellate Division for a term of five years, the cause cannot await the time when his designation expires, as section 1010 of the Code of Civil Procedure provides that if the decision be not filed within twenty days after the final adjournment of the term either party may move for a new trial.

When under such circumstances a new trial is ordered, the court cannot impose as a condition that it be retried on the testimony taken on the former trial, because section 3 of article 6 of the New York Constitution provides that "the testimony in equity cases shall be taken in like manner as in cases at law."

APPEAL by the defendant, Lewis V. F. Randolph, as president of the Consolidated Stock and Petroleum Exchange of New York, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 24th day of November, 1905.

*William V. Rowe*, for the appellant.

*Egerton L. Winthrop, Jr.*, for the respondent.

INGRAHAM, J. :

This action was tried before Mr. Justice CLARKE, who announced that he had determined it in favor of the defendant, filing an opinion stating the grounds of his decision. Before the decision was signed or judgment entered Mr. Justice CLARKE was designated as a justice of the Appellate Division in this department, whereupon,

on motion of the plaintiff, the court at Special Term set the case down for a new trial, and from that order the defendant appeals.

Section 2 of article 6 of the Constitution provides that "No justice of the Appellate Division shall exercise any of the powers of a justice of the Supreme Court, other than those of a justice out of court and those pertaining to the Appellate Division or to the hearing and decision of motions submitted by consent of counsel." Under this provision of the Constitution a designation of a justice of the Supreme Court to the Appellate Division at once suspends his power to preside at the Special or Trial Terms, and during the period for which he was so designated he can perform no judicial function except as specially authorized by the Constitution. No decision having been signed, the trial was not completed, and Mr. Justice CLARKE was disqualified from continuing the trial. If a decision had been actually signed and filed before his designation, a judgment could have been made and entered at the Special Term of the Supreme Court presided over by another justice. But the formal decision required by section 1022 of the Code of Civil Procedure must be in writing and filed in the clerk's office. (Code Civ. Proc. § 1010.) There would be no question if the term of office of the trial judge had expired, or if for any cause he had ceased to hold the office.

The defendant, however, claims that as Mr. Justice CLARKE's right to decide this case was only suspended during the period that he was acting as a justice of the Appellate Division, the court had no power to order a new trial, but that the case must wait until his designation as a justice of the Appellate Division expires, when he could resume the trial of the case, sign his decision and direct entry of judgment. Undoubtedly, as we held in the case of *Irving National Bank v. Moynihan* (78 App. Div. 141), if his term in the Appellate Division had terminated, no motion in the meantime having been made for a new trial, he could resume the trial, sign the findings and direct the entry of judgment. Such, however, is not the case. He is designated for five years from October, 1905. Section 1010 of the Code of Civil Procedure provides that if the decision is not filed in the clerk's office within twenty days after the final adjournment of the term where the issue was tried, either party may move for a new trial on that ground. This section authorized

App. Div.]

First Department, March, 1906.

the order appealed from. We think, therefore, that as the trial justice had become disqualified to continue the trial, and the decision was not filed as required by section 1010 of the Code, there was a mistrial, and that the court at Special Term was right in directing that the action be sent to the Special Term for trial.

The counsel for the defendant insists, however, that the court should impose as a condition for such retrial that the case be retried upon the testimony taken on the former trial. If we had power to impose this condition, I should be in favor of imposing it, but I do not think that either the Special Term or this court has such power. Section 3 of article 6 of the Constitution provides that "the testimony in equity cases shall be taken in like manner as in cases at law." This being an equity case, the testimony under this provision must be taken by the court that tries the case in open court, and the court cannot compel the parties to submit the action to be tried by a judge upon the testimony taken before another judge. We think we have no power to compel upon the new trial the case to be tried in other than the regular and orderly course, as if no trial had been had.

It follows that the order appealed from must be affirmed, with ten dollars costs and disbursements.

O'BRIEN, P. J., PATTERSON and LAUGHLIN, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements. Order filed.

---

VOORHEES RUBBER MANUFACTURING COMPANY, Respondent, v.  
FREDERICK E. McEWEN, Appellant.

First Department, March 9, 1906.

**Arrest**—action for goods obtained by false representation—when right to arrest may be established by affidavits, though verification of complaint defective.

When a complaint alleges that in order to induce the plaintiff to make a sale and delivery of goods to the defendant, and with intent to defraud it of said goods the defendant falsely and fraudulently represented that he had formed a copartnership with one M., who was a man of large resources, when in truth said M. and the defendant had not formed a copartnership, and when such

facts are also established by affidavits used on a motion to obtain the arrest of the defendant, said order of arrest will not be vacated, although the verification of the complaint be defective because taken by a notary in New Jersey, whereas the venue was laid in New York.

Such complaint is good as an unverified complaint, and section 557 of the Code of Civil Procedure allows the facts necessary to an arrest in such action to be shown by affidavit.

APPEAL by the defendant, Frederick E. McEwen, from an order of the Supreme Court made at the New York Special Term and entered in the office of the clerk of the county of New York on the 11th day of January, 1906, denying the defendant's motion to vacate an order of arrest.

*Randall H. Ludlow*, for the appellant.

*James B. Henney*, for the respondent.

INGRAHAM, J. :

The complaint alleges that between the 22d day of March, 1904, and the 4th day of August, 1904, both days inclusive, the plaintiff, at the special instance and request of the defendant, sold and delivered to the defendant certain goods, wares and merchandise of the agreed value of \$867; that of that sum, the sum of \$98.88 had been paid; that in order to induce the plaintiff to make said sale and delivery and with intent to defraud it of said goods, the defendant falsely and fraudulently represented to the plaintiff that he (defendant) had formed a copartnership with one Francis M. Miller, under the firm name and style of McEwen & Miller; that said Miller was a man of large resources, whereas, in truth said Miller and said defendant had not formed a copartnership. With this complaint there was submitted to the judge who granted the order of arrest the affidavit of the general manager of the plaintiff in the city of New York who deposes to the representations made by the defendant, that he obtained the merchandise upon such representations; the affidavit of the treasurer of the plaintiff that it relied on such representation, and the affidavit of Miller who deposes that there was never such a firm and that he never was in business with the defendant. Upon these affidavits an order of arrest was granted, whereupon the defendant moved to vacate such order of arrest. Although an affidavit of the defendant was submitted, he does not



App. Div.]

First Department, March, 1906.

deny any of the facts stated. Assuming that the verification of the complaint is irregular in that the venue is laid in the State of New York and county of New York, when it appears from the certificate of the notary public that the affidavit of notification was taken before a notary public in the State of New Jersey, it is as good as an unverified complaint. The affidavits clearly establish the representations upon which the goods were sold, the falsity of the representations, and bring the case within section 549 of the Code of Civil Procedure which provides that in an action upon contract, express or implied, other than a promise to marry, a defendant may be arrested where it is alleged in the complaint that the defendant was guilty of a fraud in contracting or incurring the liability. Section 557 of the Code provides that the order may be granted in a case specified in section 549 of the act, where it appears by the affidavit of the plaintiff or any other person that a sufficient cause of action exists against the defendant, as prescribed in that section.

It follows that the order appealed from should be affirmed, with ten dollars costs and disbursements.

O'BRYEN, P. J., PATTERSON, LAUGHLIN and CLARKE, JJ. concurred.

Order affirmed, with ten dollars costs and disbursements. Order filed.

---

EDWARD B. SCHMALHOLZ, Appellant, v. MARGARET SCHMALHOLZ,  
Respondent.

First Department, March 9, 1906.

**Divorce — temporary alimony not proper while prior award of alimony in action for separation stands — excessive counsel fees.**

While a judgment for alimony obtained by a wife in a former action brought by her for separation remains in force the court has no power to grant her temporary alimony as defendant in an action for absolute divorce.

The former decree measures the husband's obligation for support.

Though the court may have power to modify such former decree, it can only be done by application in that action.

When in the action for absolute divorce the defendant wife denies the allegations and recriminates, counsel fees are proper, but an award of \$1,000 is excessive. Counsel fees reduced to \$500.

APPEAL by the plaintiff, Edward B. Schmalholz, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 26th day of December, 1905, granting the defendant's motion for alimony and counsel fee.

*Max Schleimer*, for the appellant.

*Benno Loewy*, for the respondent.

INGRAHAM, J. :

Prior to the commencement of this action, in an action in which this defendant was plaintiff, a judgment of separation was obtained awarding her alimony of \$120 per month. That judgment remains unreversed and unmodified. Subsequent to the entry of that judgment this action was commenced to obtain an absolute divorce from the defendant upon the ground of adultery. She denied the charge and interposed a counterclaim demanding an absolute divorce from the plaintiff, whereupon a motion was made at the Special Term asking that alimony be awarded her during the pendency of the action, and for counsel fee to enable her to defend this action and to prosecute her counterclaim. The court below granted alimony at the rate of \$200 per month, inclusive of alimony awarded in the separation action, and counsel fee of \$1,000.

I do not think the court had in this action the power to award the plaintiff alimony. By the judgment in the separation action the obligation of the defendant therein for the support of his wife was fixed at the sum of \$120 per month. This was the limit of the liability of the husband for the support of his wife while that judgment remained in force, and the wife would have no claim upon the husband for support except as there provided.

While it may be true that the court had power to modify that judgment, an application for that purpose must be made in the action in which it was entered. The defendant here, having denied the allegations against her and set up a counterclaim charging the plaintiff with adultery, and asking a judgment of divorce, she should be awarded a reasonable sum to enable her to meet this charge. The counsel fee awarded her was, however, excessive.

The order appealed from should be modified by striking out the

App. Div.]

First Department, March, 1906.

provision as to alimony, and by reducing the counsel fee to \$500, and as thus modified affirmed, without costs of this appeal.

. O'BRIEN, P. J., McLAUGHLIN, CLARKE and HOUGHTON, JJ., concurred.

Order modified as directed in opinion, and as modified affirmed, without costs. Order filed.

In the Matter of the Appraisal, under the Act in Relation to Taxable Transfers of Property, of the Property of DAVID WOLFE BISHOP, Deceased.

THE COMPTROLLER OF THE STATE OF NEW YORK, Appellant; FLORENCE V. C. PARSONS and Others, as Executors, etc., of DAVID WOLFE BISHOP, Deceased, Respondents.

First Department, March 9, 1906.

**Transfer tax — surrogate has power to order reference to determine question of residence of decedent.**

When, in a proceeding to appraise the estate of a decedent for the purpose of levying a transfer tax, the question as to whether the decedent was a resident of this State is at issue, the surrogate has power, under section 2546 of the Code of Civil Procedure, to refer the question to a referee to take testimony and report with an opinion, and to direct that the appraiser await the coming in of such report.

The surrogate is not bound to decide such question of residence on the evidence taken before the appraiser.

APPEAL by The Comptroller of the State of New York from a decree of the Surrogate's Court of the county of New York, entered in said Surrogate's Court on the 26th day of June, 1905, refusing to confirm the finding of the appraiser that the testator at the time of his death was a resident of the State of New York, and further ordering that the question whether the said testator at the time of his death was a resident of the State of New York be referred to a referee to take testimony in respect thereto and to report the same with his opinion thereon to said Surrogate's Court, and that the

motion to remit the matter to the appraiser to enable him to appraise all of the assets of the decedent await the coming in of the referee's report.

*James J. McEvilly*, for the appellant.

*Herbert Parsons*, for the respondents.

INGRAHAM, J.:

This proceeding was instituted by the executors of the estate of David Wolfe Bishop, asking that the property of the testator subject to tax be appraised, and upon that petition the surrogate designated one of the appraisers "to fix the fair market value at the time of the transfer of the property which was of the above named decedent, and which is subject to the payment of any tax." The parties appeared before the appraiser, their testimony was taken, and evidence was offered by the Comptroller which it is claimed tended to show that the testator at the time of his death was a resident of the State of New York. The Comptroller attempted to obtain from the executors an account of the testator's property not situated in this State. This the executors refused to supply, whereupon the appraiser reported to the court that the testator was a resident of the State of New York; that he had appraised the estate of the testator, so far as disclosed to him, subject to taxation, and specified the property and its value. He further reported that the testator died seized of other estate, both real and personal, but that the executors had declined to furnish the appraiser with a statement of the same or to give testimony as to the character thereof, and that for that reason he was unable to make any report in respect thereto. He further reported that the deceased died on the 1st day of May, 1900; that he left a last will and testament, a copy of which was annexed to the report, which was admitted to probate in the Surrogate's Court of New York county on the 12th day of June, 1900. Upon this report coming on before the Surrogate's Court for hearing, the surrogate denied the motion to confirm the finding of the appraiser that the testator was at the time of his death a resident of the State of New York, and ordered that the question of such residence be referred to a referee, who was directed to take the testimony in respect thereto, and to report the same, with his opinion

App. Div.]

First Department, March, 1906.

thereon, to the court, and that the motion to remit the matter to the appraiser to enable him to appraise all the assets of the decedent await the determination of the surrogate upon the coming in of the report of the referee. The surrogate then fixed the value of the property within the State of New York and the tax payable thereon, and from this order the Comptroller appeals. He insists that the surrogate was bound to determine the question of the residence of the testator upon the testimony before the appraiser, and that he had no power to refer that question to a referee. I think it is quite clear from the evidence presented by the Comptroller that the surrogate was justified in refusing to confirm the report so far as it held that the testator was a resident of the State of New York.

The only other question presented is whether the surrogate had power to appoint a referee to take and report the evidence upon this question of fact which he had to determine, or was bound to determine it on the evidence before the appraiser. Section 2546 of the Code of Civil Procedure provides that "In a special proceeding, other than one instituted for probate or revocation of probate of a will, the surrogate may, in his discretion, appoint a referee to take and report to the surrogate the evidence upon the facts, or upon a specific question of fact \* \* \*. Such a referee has the same power and is entitled to the same compensation as a referee appointed by the Supreme Court, for the trial of an issue of fact in an action, and the provisions of this act, applicable to a reference by the Supreme Court, apply to a reference, made as prescribed in this section, so far as they can be applied in substance without regard to the form of proceeding."

The appraiser had reported to the surrogate the property of the testator in this State which was subject to taxation. Counsel for the Comptroller had moved that the matter be sent back to the appraiser to ascertain and report the property not in this State, but which would be subject to taxation if the testator was a resident of this State. The determination of this application depended upon the fact of the testator's residence at the time of his death. A question of fact was, therefore, presented to the surrogate for decision, and under the section of the Code to which attention has been called, I think the surrogate had the authority to appoint a referee to take

First Department, March, 1906.

[Vol. 111.]

evidence upon that question of fact, upon the determination of which the motion of the Comptroller depends.

I think the order appealed from should be affirmed, with ten dollars costs and disbursements.

O'BRIEN, P. J., McLAUGHLIN, CLARKE and HOUGHTON, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements. Order filed.

---

JOSEPH RUDOMIN, Appellant, v. INTERURBAN STREET RAILWAY COMPANY, Respondent.

First Department, March 9, 1906.

**Negligence — complaint — when allegations of injury sufficient to allow proof of impaired eyesight and varicose veins — when objection to exclusion of evidence of injuries sufficient.**

Under a complaint which alleges that the plaintiff "sustained a compound fracture of his skull," from which bone was removed, which left his brain in an exposed condition, etc., and "That the said break in the plaintiff's skull is a permanent and incurable injury, and is and will be the cause of plaintiff's being, becoming and remaining afflicted with diseases. That by reason of his said injuries \* \* \* his physical and mental abilities have been and will remain impaired, lessened and destroyed," the plaintiff may show that impairment of eyesight and varicose veins resulted from the injury, although such injuries are not specifically alleged.

Under a general allegation of bodily injuries the plaintiff may prove any injury to his person, and if the defendant desires that they should be more definitely stated he should either move to have them made more specific or for a bill of particulars. But if the complaint specifies the injuries received, proof cannot be given of any other injuries unless they necessarily and immediately flow from those named. The error in excluding such evidence of specific injury is available on appeal when the court held that the proof was inadmissible on the opening of the case and so instructed the jury, to which exception was taken.

The error is also available under an exception to the exclusion of evidence of experts offered to show such injury.

APPEAL by the plaintiff, Joseph Rudomin, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 25th day of May, 1905, upon the verdict of a jury for \$2,000, and also from an order

App. Div.]

First Department, March, 1906.

entered in said clerk's office on the 24th day of May, 1905, denying the plaintiff's motion for a new trial made upon the minutes.

*George J. Gruenberg*, for the appellant.

*Bayard H. Ames*, for the respondent.

McLAUGHLIN, J. :

This action was brought to recover damages for personal injuries alleged to have been sustained by reason of defendant's negligence in suddenly starting a car which plaintiff was about to board. The injuries received were serious. The skull was fractured to such an extent that it became necessary to remove a piece of bone about two inches long by one and a half to one and three-quarters inches wide from the left side of the forehead, which left the brain exposed except for the skin and the covering on the brain itself. He was also injured in other respects. Plaintiff had a verdict for \$2,000; and from the judgment entered thereon he has appealed.

At the trial he sought to show as a result of the injury an impairment of the eyesight. The testimony, however, bearing on this subject was excluded and an exception taken on the ground that such proof was inadmissible under the allegations of the complaint. He also attempted to show that as a result of his injuries he was suffering at the time of the trial from varicose veins. This testimony was also excluded for a similar reason.

The main question presented, therefore, on this appeal is whether, under the allegations of the complaint, plaintiff was entitled to make this proof. The complaint alleged that by reason of the negligence of the defendant "the plaintiff sustained a compound fracture of his skull; his arm, elbow, ankle, legs and back were cut, bruised and contused; and the said fracture made it necessary to have and the plaintiff did have a surgical operation performed on his skull, and have certain bones and pieces of skull and pieces of skin and flesh extracted and removed therefrom, which left his brain at the said break in an exposed condition and without any protection other than the skin which has grown over the said break. That the said break in the plaintiff's skull is a permanent and incurable injury, and is and will be the cause of the plaintiff's being, becoming and remaining afflicted with diseases. That by reason of his said injuries

the plaintiff has suffered and will continue to suffer great physical pain and mental anguish, and his physical and mental abilities have been and will remain impaired, lessened and destroyed."

I am of the opinion that under this allegation the plaintiff was entitled to prove an impairment of the eyesight, or any other impairment of his mental or physical abilities, as well as any disease with which he was afflicted which he could prove was directly traceable to or proximately flowed from the fracture of the skull, the injury to "his arm, elbow, ankle, legs and back."

The leading case on the subject as to what can be proved in an action of this character under a general allegation of bodily injuries is *Ehrgott v. Mayor, etc., of City of N. Y.* (96 N. Y. 264). There the allegation was that the plaintiff had "suffered great bodily injury ; that he became and still continues to be sick, sore and disabled," and it was held that this was a sufficient allegation to entitle the plaintiff to prove a disease of the spine. But it is claimed that the rule laid down in this case has been qualified to a certain extent by the more recent case of *Kleiner v. Third Avenue R. R. Co.* (162 N. Y. 193). This case does not, in express terms, either modify or qualify the rule laid down in the *Ehrgott* case, nor do I think, when carefully considered, it changes the rule there stated. The rule now seems to be that under a general allegation of bodily injuries the plaintiff may prove any injury to his person, and if the defendant desires that they should be more definitely stated, then it should move to have them made more specific or for a bill of particulars. But where the complaint specifies the injuries received, then proof cannot be given of any other injuries unless they necessarily and immediately flow from those named.

In the *Kleiner* case the allegation of the complaint was that the plaintiff had received severe and painful contusions to her head, body and arms, and that her scalp had been lacerated "whereby she sustained severe nervous shock and concussion of the brain and injured her eyesight and she was for a time rendered unconscious, and she *thereby* sustained permanent injuries and was injured for life." Under this allegation the plaintiff was permitted to prove that the dorsal muscle of the right side was paralyzed and that she suffered from vertigo, curvature of the spine, and other diseases. This was held error, the court holding that the principle in the



App. Div.]

First Department, March, 1906.

*Ehrgott* case did not apply, inasmuch as the plaintiff had specified the injuries which she had sustained and that the allegation was that she "thereby sustained permanent injuries, thus in effect limiting her permanent injuries to those previously alleged." In the case now before us the allegation is that the injury to the skull is and will be the cause of plaintiff's becoming and remaining afflicted with diseases. He was, therefore, entitled to prove that he was afflicted or would be afflicted with any disease which was the direct result of this injury, whether it be an impairment of the eyesight or varicose veins. Then, too, under the allegation that, by reason of the injuries specified, plaintiff's "physical and mental abilities have been and will remain impaired," he was entitled to prove that his ability to see had either been wholly or partially destroyed. Impairment of the eyesight, either complete or partial, resulting from an injury to the skull, if not a disease, is certainly an impairment of one's physical ability to see.

That plaintiff was entitled to make this proof is clearly established by numerous decisions of this court. In *Eichholz v. Niagara Falls H. P. & M. Co.* (68 App. Div. 441; *affd.*, 174 N. Y. 519) the complaint alleged that the plaintiff "was greatly shocked and bruised about his body, his spinal column strained and injured, and his leg bruised and the cords and muscles lacerated, torn and disconnected from the bone, and otherwise injuring plaintiff and causing him great pain and suffering, and he was rendered sick, sore and lame and now is and ever since has remained sick, sore and lame." It was held that this allegation was sufficient to warrant the admission of proof that the plaintiff, as the result of the accident, was suffering from diabetes.

In *Graham v. Bauland Co.* (97 App. Div. 141) the complaint alleged that the plaintiff was seriously and permanently bruised and injured, and it was held that proof was admissible tending to show an impairment of eyesight and hearing. In *Mullady v. Brooklyn Heights R. R. Co.* (65 App. Div. 549) it was held that an allegation in the complaint that the plaintiff sustained serious and lasting bodily injuries to his head, limbs and nervous system, entitled him to prove not only impairment of eyesight, but hearing. And to the same effect is *Quirk v. Siegel-Cooper Co.* (43 App. Div. 464).

A case which seems to be directly in point is *Radjaviller v.*

*Third Ave. R. R. Co.* (58 App. Div. 11), in which the opinion of this court was delivered by the present presiding justice. There the complaint alleged that the plaintiff sustained severe injuries on her left foot, left arm, left side of her head and her entire left side. It was there held that this allegation entitled the plaintiff to introduce proof to the effect that she sustained an injury to her left ear. (See, also, *Bolte v. Third Ave. R. R. Co.*, 38 App. Div. 234; *Garbaczewski v. Third Ave. R. R. Co.*, 5 id. 186.) Here, the injuries are alleged, as it seems to me, in a much more general way than in some of the cases cited. The allegation is that the injury to the skull has been, is and will be the cause of plaintiff's becoming and remaining afflicted with diseases. If, as already suggested, an impairment of the eyesight is a disease, then proof would be admissible under this allegation. And this applies equally to the proof as to the varicose veins. Then, under the allegation as to the injury to the skull, plaintiff's "physical and mental abilities have been and will remain impaired," entitled him to show an impairment of any of the physical conditions of the body, which, of course, included seeing.

But it is suggested that the appellant is not in a position to take advantage of these rulings inasmuch as no exception was taken to the charge to the jury bearing upon the question of damages. There was no necessity for taking an exception in order to raise the errors here alleged. When the plaintiff's counsel opened the case to the jury he stated that he proposed to offer proof that the plaintiff's eyesight had been impaired. Defendant's counsel then objected that such proof would be inadmissible under the complaint and the court held that such proof was inadmissible and so instructed the jury, to which an exception was taken. The question was also presented sharply when the plaintiff put Dr. Wolff, an eye expert, upon the stand and, after qualifying him, asked the following question: "State what you found to be his condition." The objection then was interposed that if it were sought to show an impairment of the eyesight, it was inadmissible under the complaint. Plaintiff's counsel stated that the purpose of this proof was to show that the plaintiff had lost the power of his eyesight by the fracture of his skull. The objection was sustained and an exception taken. And a similar ruling was made and an exception taken when proof was

App. Div.]

First Department, March, 1906.

offered as to the varicose veins, and in excluding this proof I think the court erred and a new trial should be ordered. Other errors are alleged which would require serious consideration, but inasmuch as there must be a new trial, it is unnecessary to here consider them.

The judgment and order appealed from, therefore, should be reversed and a new trial ordered, with costs to appellant to abide the event.

O'BRIEN, P. J., PATTERSON, LAUGHLIN and HOUGHTON, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

---

THE CORN EXCHANGE BANK, Respondent, v. HENRY W. PEABODY and Others, Composing the Firm of HENRY W. PEABODY AND COMPANY, Appellants.

First Department, March 9, 1906.

**Conversion — measure of damage — when plaintiff not entitled to recover highest market value — erroneous charge.**

In an action for the conversion of personal property, in the absence of special circumstances, the value of the property at the time of such conversion, with interest, is the measure of damage, and it is error for the court to charge that the plaintiff is entitled to recover "the highest value of the article converted \* \* \* from the time of the conversion to the time of trial," with interest on such value.

When the jury has found a verdict for the highest value proved by the plaintiff, in the face of evidence of a much less value shown by the defendant, it cannot be said that such erroneous charge did not prejudice the defendant, as it excluded the defendant's evidence from the consideration of the jury.

**APPEAL** by the defendants, Henry W. Peabody and others, composing the firm of Henry W. Peabody and Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 3d day of April, 1905, upon the verdict of a jury, and also from an order entered in said clerk's office on the 3d day of April, 1905, denying the defendants' motion for a new trial made upon the minutes.

*W. P. Prentice*, for the appellants.

*John M. Bowers*, for the respondent.

McLAUGHLIN, J.:

This action was brought to recover the value of certain goat skins alleged to have been wrongfully converted by the defendants. These skins, consisting of two lots—one designated M. H. S. C. V. and the other D. R.—were stored by plaintiff's assignor at different times with one Weber in warehouses kept by him. The defendants had also stored similar skins in the same warehouses. The warehouseman made a general assignment for the benefit of creditors and thereupon the defendants, being unable to obtain possession of their skins from the assignees, brought an action for that purpose. A writ of replevin was issued under which the defendants, acting through the sheriff, took possession of a large number of skins, including those alleged to belong to the plaintiff, which were subsequently sold.

The plaintiff alleged in its complaint that the value of the skins taken was \$18,128.83, for which judgment was demanded besides interest. The defendants denied not only the conversion, but also that the skins were of the value alleged.

At the trial much evidence was given by both parties bearing upon the question of the conversion and the identity of the skins, as well as their value, the plaintiff's proof tending to show that the value of the M. H. S. C. V. skins was \$8,290.06 and the value of the L. R. skins \$7,175, making in all \$15,465.06, while the defendants' proof tended to show that the skins were of much less value, especially the D. R. skins. The jury evidently accepted the testimony offered on the part of the plaintiff as correctly stating the value of the skins by rendering a verdict in its favor for \$19,206.06, which was the value of the skins as stated by plaintiff's witnesses, together with interest from the time the conversion took place to the time of the trial. Judgment was entered upon the verdict and defendants appeal. Numerous errors are alleged as calling for a reversal of the judgment, both as to the admission and rejection of evidence, and especially as to the sufficiency of the proof to establish that all of the skins for which an award has been made belonged to the plaintiff.

App. Div.]

First Department, March, 1906.

These questions or some of them would require very serious consideration, but inasmuch as we are all agreed there must be a new trial on account of an error in the charge, and they may not again be presented, it is unnecessary to pass upon them.

The value of the skins taken was one of the questions seriously contested at the trial, and while there was no great difference between the parties as to the value of the M. H. S. C. V. skins, there was a very material difference as to the value of the D. R. skins, the plaintiff's testimony tending to show that they were worth, in February when the conversion took place, at least thirty-five cents per pound, while the testimony on the part of the defendants tended to show that they were worth at most from ten to seventeen cents per pound. All of the skins were sold by the defendants and there does not seem to be any serious question raised but what they obtained the best possible price at such sales, the M. H. S. C. V. skins bringing \$7,680.94, and the D. R. \$1,929.90, making in all \$9,610.84, yet the jury found that the value of the skins was several thousand dollars more than the amount realized by the defendants. Bearing upon the question of the value of the skins the learned trial justice, in submitting the case to the jury, said: "The plaintiff is entitled to recover the highest value of the article converted, if you find there was a conversion in this case, from the time of the conversion to the time of the trial, and he is also entitled to recover as damages, interest upon such value." An exception was duly taken to this portion of the charge and the plaintiff's counsel, evidently realizing that it was not the proper rule, immediately said: "I am perfectly willing that should be corrected," to which the court responded: "I refuse to correct it and refer you both to *Fragler v. Hearst* (91 Appellate Division, 12). I reiterate that charge. It is the rule of damages in conversion cases." The learned court was in error. It is not the proper rule of damages in actions of conversion. As I understand it the general rule is this — in the absence of special circumstances, in an action for conversion of personal property the value of the property at the time of such conversion, with interest, is the measure of damage. This is fair to both parties. It compensates the one for the loss sustained and compels the other to pay that loss for the wrong committed. (*Matthews v. Coe*, 49 N. Y.

57; *Baker v. Drake*, 53 id. 211; *Ormsby v. Vermont Copper Mining Co.*, 56 id. 623; *Parsons v. Sutton*, 66 id. 92; *Barnes v. Brown*, 130 id. 372; *Parmenter v. Fitzpatrick*, 135 id. 190.) No special circumstances were alleged in the complaint, nor were any facts proved upon the trial to take this case out of the general rule. The plaintiff was entitled to recover, if at all, the value of the skins at the time the conversion took place, together with interest thereon to the time of trial. He was not entitled to recover their highest value between the time of conversion and the time of trial. I have been unable to find a single authority in this State which sustains the instruction given other than *Markham v. Jaudon* (41 N. Y. 235), which was expressly overruled by *Baker v. Drake* (*supra*).

*Flagler v. Hearst* (91 App. Div. 12), relied upon by the trial court, does not sustain it. That was an action for the conversion of a yacht which was afterwards returned to the plaintiff, who had a recovery, and defendant appealed. One of the errors alleged as calling for a reversal of the judgment was that the jury had been erroneously instructed as to the measure of damage. The trial court laid down the rule that the plaintiff's measure of damage was the value of the use of the yacht and the damage that she had suffered during the time she was in possession of the defendant. This was held to be erroneous, and for that reason a new trial was ordered; and while there are expressions in the opinion to the effect that the plaintiff was entitled to recover the highest value of the yacht from the time the conversion took place to the time of the trial, such expressions have no binding force except as applied to that case. A decision has no binding force except in so far as it determines the question then before the court. This rule was reiterated by the Court of Appeals in the recent case of *Crane v. Bennett* (177 N. Y. 106), where the court said: "It was not our intention to decide any case but the one before us \* \* \* and our opinion should be read in the light of that purpose. If, as sometimes happens, broader statements were made by way of argument or otherwise than were essential to the decision of the questions presented, they are the *dicta* of the writer of the opinion, and not the decision of the court. A judicial opinion, like evidence, is only binding so far as it is relevant, and when it wanders from the point at issue it no longer has force as an official utterance.'"

App. Div.]

First Department, March, 1908.

Besides, in the *Flagler case*, there were special circumstances which took it out of the general rule.

But it is urged by the respondent's counsel that even if the instructions of the court as to the measure of damage were an incorrect statement of the law, nevertheless the judgment ought not to be reversed because such instructions could not have had any effect upon the verdict. What is claimed in this respect is that the evidence offered by the plaintiff tended to show the value of the skins at the time the conversion took place, and not at a subsequent date; that the only evidence of value of any other date than the date of conversion was introduced by the defendants, and for the most part consisted of proof of the disposition of the goods at a later date, which showed a value slightly less as to the M. H. S. C. V. skins, and much less as to the D. R.; and as the highest value proved was of the date of the conversion it was immaterial that the jury should be instructed, if they found a conversion, they should award the highest value between the date of conversion and the date of trial. This reasoning is plausible, but not sound. The value of the goods, as already said, was one of the serious questions litigated. Plaintiff was not entitled to the *highest* value, but to the actual value of the goods at the time the conversion took place, and in determining what such actual value was at the date the conversion took place the jury had a right to consider—indeed, they were bound to consider—all of the evidence offered by both parties bearing on that subject, and this included what the skins brought when sold. (*Parmenter v. Fitzpatrick, supra.*) The instructions practically withdrew from the jury the defendants' evidence bearing upon the subject of value and left simply the plaintiff's evidence to be considered, because that established the highest value. The jury could not under the instruction weigh all the evidence and from that determine what the value was at the time of the conversion.

The case was submitted to the jury upon an erroneous theory as to the measure of damage. The instructions permitted them to award damages to which the plaintiff was not entitled. That the defendants were prejudiced by these instructions is sufficiently evidenced by the verdict rendered, and, therefore, justice requires there should be a new trial.

The judgment and order appealed from is reversed and new trial ordered, with costs to appellants to abide event.

O'BRIEN, P. J., PATTERSON, LAUGHLIN and HOUGHTON, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellants to abide event. Order filed.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v. DAVID LEWIS, Respondent, Impleaded with HARRY COHEN and Others, Defendants.

First Department, March 9, 1906.

**Criminal law—when withdrawal of counts in an indictment does not invalidate conviction under remaining counts—*nolle prosequi* abolished.**

Although on the trial of an indictment charging (1) burglary in the third degree, (2) grand larceny in the first degree, (3) receiving stolen goods, the prosecution abandoned the first and second counts, a motion to arrest judgment after a conviction on the third count should not be granted when the point that the third count became defective by the withdrawal of the first and second counts was not raised until after the conviction.

In the absence of such objection, the withdrawn counts remain in the indictment for the purpose of explaining the references contained in the third count, and if when retained for that purpose the third count is sufficient, arrest of judgment should not be granted.

The *nolle prosequi* is abolished by section 672 of the Code of Criminal Procedure.

APPEAL by the plaintiff, The People of the State of New York, from an order of the Court of General Sessions of the Peace in and for the city and county of New York, entered in the office of the clerk of said court on the 6th day of February, 1906, granting a motion in arrest of judgment.

*Robert C. Taylor*, for the appellant.

*Leonard A. Snitkin*, for the respondent.

McLAUGHLIN, J.:

The defendant, with others, was tried upon an indictment containing three counts charging him with (1) burglary in the third degree, (2) grand larceny in the first degree, and (3) receiving stolen goods. At the beginning of the trial, upon motion of the



App. Div.]

First Department, March, 1906.

district attorney, the court granted permission to withdraw the counts of grand larceny and burglary, and the trial then proceeded under, and the case was submitted to the jury on, the third count. The defendant was convicted and thereupon made a motion for arrest of judgment, which was granted, and the People appeal.

The motion was granted, as appears from the statement of the learned trial judge and the briefs presented, upon the ground that the third count, under which the trial and conviction were had, standing by itself, did not state facts sufficient to constitute a crime and the defects in the indictment were not cured, notwithstanding reference was made to the preceding counts which set out the material facts omitted in the third count, under the authority of *People v. Werbin* (27 Hun, 311).

If we were disposed to follow the *Werbin* case, which we are not, it would not be difficult to distinguish it from the case now before us. The indictment was found and the indictment had in that case prior to the adoption of the Code of Criminal Procedure, which provides (§§ 285, 542, 684) that an indictment is not insufficient, nor is the trial, judgment or other proceedings thereon affected by reason of an imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits, and that all technical objections must be disregarded which do not prejudice the defendant in such respect. There the defendant was indicted for arson. There were three counts in the indictment, two of which were abandoned by the entry of a *nolle prosequi*. Immediately upon such entry being made, defendant's counsel moved to discharge the defendant upon the ground that the third count was insufficient. The motion was denied, and on appeal the court held that the effect of the *nolle prosequi* was to strike out the first and second counts; that those counts having been in effect expunged, the third count was insufficient because its essential elements of time and place rested upon reference to allegations in that respect contained in the other counts. The Code of Criminal Procedure abolishes a *nolle prosequi* (§ 672). But even if the withdrawing of the first and second counts were to be considered in effect the same as the entry of a *nolle prosequi*, the *Werbin* case would not apply because there, as soon as the first and second counts had been abandoned, the objection was taken that the third count

did not justify a conviction, while here no such objection was made until after the defendant had been convicted, and it must be held, under the authority of *People v. McLaughlin* (150 N. Y. 365) that the failure to object was in effect a consent by defendant that the first and second counts be retained for the purpose of explaining the references contained in the third count, and that when retained for that purpose the third count was sufficient.

It is unquestionably true that an indictment must contain every essential element of the crime charged, and the charge must be made directly and not inferentially, but it is equally true that a count in an indictment is good if the facts there stated, and those stated in a preceding count to which reference is made by apt and appropriate words, contain all the essential elements of the crime charged against the defendant and for which he is tried. (*People v. Danily*, 63 Hun, 579; *People v. Graves*, 5 Park. Cr. Rep. 134; *People v. McLaughlin*, *supra*; *Commonwealth v. Clapp*, 82 Mass. (16 Gray) 237; *State v. Dufour*, 63 Ind. 567; *Blitz v. United States*, 153 U. S. 308; *Crain v. United States*, 162 id. 625.) The purpose of an indictment is to inform the defendant, at the time he is arraigned, of the crime which he is accused of having committed, to the end that he may prepare for and properly defend himself at the trial. This purpose is accomplished where there are several counts in an indictment, some of which are abandoned, if the count or counts under which the trial proceeds fully set out the facts constituting the crime either directly or by reference to preceding counts. Such reference draws to and embodies in the count under which the trial is had a statement of the facts omitted.

This defendant knew, at the time he was arraigned, that the third count in the indictment charged him with having received, at the time and place stated, the property mentioned in the first two counts in the indictment, knowing such property to have been stolen. It charged him with having knowingly received "on the day and in the year aforesaid, at the borough and county aforesaid, the same goods, chattels and personal property mentioned, described and set forth in the second count of this indictment, to which reference is hereby made." That he knew this is obvious from the fact that he proceeded with the trial and in no way questioned the validity of this count until after he had been convicted. The indictment fully

App. Div.]

First Department, March, 1906.

advised the defendant of the crime with which he was charged. It enabled him to prepare his defense. It protects him against a subsequent prosecution for the same offense. This is all that is required in an indictment. (*People v. Weldon*, 111 N. Y. 569; *People v. Herlihy*, 66 App. Div. 534; *affd.*, 170 N. Y. 584.)

If the foregoing views be correct, then it follows that the order appealed from should be reversed, the motion in arrest of judgment denied, and the matter remitted to the Court of General Sessions of the Peace in and for the county of New York to proceed according to law and to render such judgment against defendant as it may be advised.

O'BRIEN, P. J., INGRAHAM, CLARKE and HOUGHTON, JJ., concurred.

Order reversed and motion denied, matter remitted to Court of General Sessions.

---

GEORGE M. STEVENS, JR., Appellant, v. LOUISE D. TAYLOR,  
Respondent.

First Department, March 9, 1906.

**Landlord and tenant — action to restrain landlord from interfering with use of furnace by tenant — use of furnace included in the word "appurtenances" — temporary injunction.**

In an action in equity by a tenant against his landlord under a lease of the basement and parlor floor of premises "with the appurtenances," to procure an injunction restraining the defendant from interfering with the use by the plaintiff of a furnace in the cellar, which is the only means of heating the plaintiff's quarters, an injunction *pendente lite* should be granted.

Although the lease is silent as to the provisions for heat, it is immaterial because the right to heat with the only means provided therefor is included in the word "appurtenances."

APPEAL by the plaintiff, George M. Stevens, Jr., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 29th day of January, 1906, denying the plaintiff's motion for an injunction *pendente lite*.

*Rufus L. Weaver*, for the appellant.

*James A. Allen*, for the respondent.

APP. DIV.—VOL. CXI. 36

McLAUGHLIN, J.:

The defendant owns what is termed a two-family house, that is, one constructed in such a way as to be occupied by two families. The plaintiff leased the basement and parlor floors, and the defendant occupies the floors above. Immediately below the floors leased to the plaintiff is the cellar, in which is placed a hot-air furnace which supplies heat to all of the rooms, with the possible exception of plaintiff's kitchen. The furnace was placed in the cellar when the building was constructed, and since that time it has been used for the purpose of heating the different rooms in the house, and in fact is the only way at present provided for heating such rooms. The plaintiff went into possession of the rooms occupied by him on the 3d of November, 1904, under an agreement which provided that the heat was to be furnished by the defendant. This agreement was informal, and on the second of December following (heat in the meantime having been furnished) it was supplemented by a formal lease in which nothing was said about heat, but, nevertheless, defendant continued to furnish it at her own expense to the 11th of November, 1905, when she refused any longer to do so, and also refused to allow the plaintiff to use the furnace, he himself furnishing his own fuel. Thereupon this action was brought to procure, among other things, a judgment enjoining the defendant from interfering with the plaintiff in the use of the furnace for heating the premises occupied by him during the term of his lease. He obtained an injunction granting him this relief pending the return of an order to show cause why the same should not be continued during the pendency of the action. Upon the return of the order, the injunction was vacated and plaintiff appeals.

I am of the opinion that the court erred in refusing to continue the injunction during the pendency of the action. The plaintiff has no adequate remedy at law, and the action being in equity, he ought to have the injunction during its pendency. Otherwise if the lease expires before the trial, he will be unable to obtain any equitable relief whatever. The defendant leased to the plaintiff "the basement and parlor floors \* \* \* with the appurtenances." The furnace was an appurtenance to the premises leased, just as much as was access to the rooms. Everything is included within the word "appurtenances" which is necessary and essential to the bene-

App. Div.]

First Department, March, 1906.

ficial use and enjoyment of the thing leased or granted. (*Doyle v. Lord*, 64 N. Y. 432; *Voorhees v. Burchard*, 55 id. 98; *Huttemeier v. Albro*, 18 id. 48; *Matter of Hall v. Irvin*, 78 App. Div. 107; *Riddle v. Littlefield*, 53 N. II. 503.) The fact that the lease contains no provision as to heat, or any reference to the furnace, is of no importance, because the right to heat with the only means provided is included within the word "appurtenances." Unless it is, then the plaintiff can neither enjoy nor use, at times, the rooms leased and for which he has paid the stipulated rent. It is suggested that there are grates in some of the rooms which might be used, but the fact is undisputed that these grates cannot be used in their present condition, and plaintiff is not obligated under his lease to change the rooms so they can be used and occupied, because the lease implied they were in condition suitable for the use for which they were leased.

When one leases rooms in a building, this carries with it not only the right of access, but the right to heat them if necessary; and if the only means provided by which the rooms can be heated be a furnace in the cellar, then the right to use such furnace for that purpose. To hold otherwise would enable the lessor, at the expense of the lessee, to destroy, either in whole or in part, the subject-matter of the lease by depriving the lessee of the beneficial use and enjoyment of the thing leased.

Upon the undisputed facts and under the authority of *Doyle v. Lord* (*supra*) I think the injunction should have been continued during the pendency of the action.

The order appealed from, therefore, should be reversed, with ten dollars costs and disbursements, and the motion for an injunction granted to the extent of enjoining the defendant, during the term of plaintiff's lease, from interfering with him in the use of the furnace, including putting or keeping the same in repair, in so far as such use may be necessary for furnishing heat to the rooms which he occupies.

O'BRIEN, P. J., INGRAHAM, CLARKE and HOUGHTON, J.J., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted to extent stated in opinion. Order filed.

HOFFMAN HOUSE, NEW YORK, Respondent, v. ROSE L. BARKLEY, Substituted as Defendant in the Place and Stead of the MANHATTAN STORAGE AND WAREHOUSE COMPANY, Appellant, Impleaded with Others. (Action No. 2.)

First Department, March 9, 1906.

**Mortgage—evidence insufficient to show that a painting was covered by mortgage on hotel property.**

When it is a question whether a certain painting called "Love's Surprise" by Scalbert was covered by a mortgage executed by the president of a hotel corporation, through the foreclosure of which the plaintiff claims title, the mere fact that the schedule of property annexed to said mortgage included a "painting by Scalbert" is not sufficient to prove that "Love's Surprise" was the painting intended, when the other evidence shows that said president had been in possession of said painting and treated it as his private property.

O'BRIEN, P. J., and LAUGHLIN, J., dissented, with opinion.

APPEAL by the defendant, Rose L. Barkley, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 31st day of March, 1905, upon the decision of the court rendered after a trial at the New York Special Term.

*John J. Kirby*, for the appellant.

*Albert A. Wray*, for the respondent.

INGRAHAM, J.:

The nature of the action is stated in the opinion of Mr. Justice LAUGHLIN. We do not concur in his conclusion as we think the evidence was not sufficient to justify a finding that this painting, called "Love's Surprise," ever was the property of C. H. Read & Co. or their successors, the Hoffman House corporation. The fact that in a schedule annexed to a mortgage by the corporation there was included a painting by Scalbert was not sufficient to justify a finding that this particular painting sued for was ever the property of the plaintiff or of the corporation to whose rights it succeeded. The painting is in the possession of the defendant, and to justify this judgment there must be competent evidence of its ownership by the plaintiff. The evidence shows that Stokes always treated

App. Div.]

First Department, March, 1906.

this painting as his private property ; that it was never in the hotel proper or treated by either the copartnership or its successor as hotel property.

We think, therefore, that the judgment should be reversed and a new trial ordered, with costs to the appellant to abide event.

PATTERSON and CLARKE, JJ., concurred ; O'BRIEN, P. J., and LAUGHLIN, J., dissented.

LAUGHLIN, J. (dissenting):

This is an action to recover the possession of an oil painting by Scalbert, known in the art world by the title, "Love's Surprise." Prior to the commencement of the action the painting had been stored with the Manhattan Storage Warehouse, from which it was replevied herein and delivered to the plaintiff. The action was originally brought against the warehouse company and one Ella Harthorne, but after the seizure of the painting under the writ of replevin the appellant was substituted in place of the former defendants. The painting was in the possession of Edward S. Stokes, at his residence in Seventy-ninth street, at the time of his death on the 2d day of November, 1901. The appellant claims that the title thereto also was in him, and she claims title through him, or a right to possession as his widow. The plaintiff claims title by purchase on a foreclosure sale on the 25th day of May, 1894, under a mortgage given by the Hoffman House Company of New Jersey to the Farmers' Loan and Trust Company as trustee, executed in behalf of the company by said Stokes, as its president, on the 2d day of September, 1890. The mortgage recited that the mortgagor had acquired from the firm of C. H. Read & Co. "the ownership and title to the fixtures, chattels, assets and property" then "owned and used by it in its business of conducting hotels and restaurants in the City of New York" at certain specified places, including "The Hoffman House, at Broadway and Twenty-fifth Street," and had agreed as part payment therefor to execute and deliver a series of 500 bonds of the par value of \$1,000 each, secured by a mortgage upon the property, and that the mortgage was given pursuant to said agreement. The property covered by the mortgage consisted of fixtures and other personal property and leases described in schedules annexed to the mortgage. The mortgage, after enumer-

ating the schedules and making them a part thereof, contained the following provision: "It being intended hereby to convey unto the said party of the second part all the property, assets and effects of every kind and nature whatsoever, now owned and used by the said party of the first part (the mortgagor) in and about its said business, wheresoever the same may be situated, and whether included in the schedules hereto annexed or omitted therefrom, together with all the fixtures, assets, property and chattels hereafter to be acquired by it in the conduct of its business, either in addition to, or in substitution of, the property now owned by it, and such after-acquired property shall be deemed to be embodied in and subject to the lien of this mortgage, even though not specially designated therein."

In Schedule C, specified in and annexed to the mortgage, there was enumerated under the heading "The Hoffman House," among other paintings and property, the following: "Painting, by Scalbert." The description of the property in the judgment of foreclosure and in the bill of sale executed by the referee, so far as material to the decision of the question presented by this appeal, at least, was the same as in the mortgage.

Since the appellant's only claim of title or right to possession is through Stokes, who as president of the Hoffman House Company of New Jersey executed the mortgage, it is manifest that the only question presented by the appeal is whether the painting "Love's Surprise," by Scalbert, was covered by the mortgage. The evidence shows that at the time the mortgage was executed this painting was hanging on the wall in the private apartment of said Stokes, situated in the Worth House, which was used as an annex to the Hoffman House, and that another painting, "Faust's Dream," by Falero, definitely described in and clearly covered by the mortgage and owned by the mortgagor, and still others the ownership of which was not shown and not-shown to have been or not to have been covered by the mortgage, adorned the walls of the same apartment. It does not appear that any other painting by Scalbert was included in the mortgage, or that any other painting by Scalbert was in the apartment or in the Hoffman House or the Worth House, or whether or not there was any other painting by Scalbert in existence. It appears that Stokes continued to live at the Worth House until 1894 or 1895, and then moved into the Hoffman House



App. Div.]

First Department, March, 1906.

proper, where he remained until September, 1897, when he sold his stock in, and severed official connection with, the plaintiff and moved uptown.

It is claimed by the learned counsel for the appellant that the evidence was insufficient to identify this painting as the one referred to in the mortgage. It is to be borne in mind that no rights of creditors are involved. The question is to be decided as if Stokes were here claiming that the mortgagee could not claim this painting under the mortgage. It is evident that the mortgage covered *some* painting by Scalbert. This painting was there and it was painted by Scalbert. It is reasonable to infer that if there had been another painting by Scalbert in Stokes' apartment and owned by him, or on the premises used for hotel purposes and not intended to be embraced in the mortgage, a more definite description of the painting intended to be mortgaged would have been inserted in the schedule. There is no definite evidence either that this painting was owned by Read & Co., or that it was used in connection with the hotel business, prior to the execution of the mortgage through the foreclosure of which plaintiff claims title, other than its use in the private apartment of the president of the hotel company as aforesaid. There is some evidence that subsequent to the execution of the mortgage, and in 1892 or 1893, the painting was hanging on the wall over the Hoffman House bar, and that when Stokes moved from the Worth House into the Hoffman House it was brought there, with other effects of his, and hung on the wall of one of the rooms occupied by him as his private apartments. But this is somewhat vague, and it is not corroborated by the testimony of witnesses who should have been able to corroborate it if true, and is controverted by the testimony of other witnesses.

We are of opinion, therefore, that the only theory on which the judgment can be sustained is that "Love's Surprise" is the painting described in the schedule annexed to the mortgage and in the foreclosure proceedings as a "painting by Scalbert." The evidence on that point, as has been seen, is meagre, and it would seem that it could have been made more conclusive. We think, however, that, from all the facts and circumstances, the inference that it is the painting covered by the mortgage and purchased by the plaintiff on the sale under the judgment of foreclosure is fairly

justified. If so, the removal of the painting to Stokes' private residence was wrongful, and, therefore, no demand was necessary. After Stokes severed his connection with the plaintiff, and moved from the Hoffman House, the plaintiff became involved in important litigation with him, and it does not appear that the officers of the plaintiff knew where the painting was. In these circumstances, the failure to commence the action until after his death was a fact having little bearing on the merits of the case.

We have examined the other exceptions, but they do not merit special mention.

It follows that the judgment should be affirmed, with costs.

O'BRIEN, P. J., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

---

EDWARD CRAMSEY, Appellant, v. CHARLES ARCHER STERLING,  
Respondent.

First Department, March 9, 1906.

**Deed — action to set aside conveyance and assignment made by devisee — fraudulent representations by grantee — evidence sufficient to establish legitimacy and title of grantor.**

Action to set aside a conveyance of plaintiff's interest as devisee under the will of Harriet Cramsey of certain real estate and an assignment of his interest in her estate on the grounds that the same were procured by false and fraudulent representations. Her will gave to her son Benjamin the use for life of a portion of her estate, and at his death "to his children then living."

The plaintiff claims title as the son and only heir of Benjamin. The action was defended on the ground that plaintiff was not the lawful issue of Benjamin, and that the instruments were not procured by fraud.

As to plaintiff's legitimacy it was shown that Benjamin Cramsey had lived with plaintiff's mother at the home of her parents at the time and before the birth of plaintiff; that plaintiff was born there; that Benjamin introduced plaintiff's mother to his relatives and neighbors as his wife, and brought a brother to see their son, the plaintiff; that plaintiff's mother preserved a paper which, though not in the statutory form, she regarded as a marriage certificate, and also a certificate of the baptism of plaintiff under the name of Cramsey. The agent employed to procure the deed and assignment knew of the plaintiff's existence as the son of Benjamin, and the deed and assignment recited the fact

App. Div.]

First Department, March, 1906.

that he was such son; the grantee and assignee, a grandson of Harriet Cramsey, had full opportunity of ascertaining and knowing his relatives, and his father represented him in the investigation as to the existence of an heir of Benjamin and suggested that the deed and assignment run to defendant. The only evidence to the contrary was that of the defendant's father, that he did not know of any acquaintance or intimacy between his brother and plaintiff's mother, of their marriage or the birth of plaintiff, and that his brother did not live at the residence of plaintiff's mother.

*Held*, that assuming that the burden was on plaintiff to establish that he was the heir of Benjamin, he had sustained it by a fair preponderance of evidence and a finding that the contract of marriage was not proved was against the weight of evidence.

On the question as to whether the deed and assignment were procured by false and fraudulent representations, it was shown that the plaintiff was ignorant, could hardly read and write; that he did not solicit the purchase of his interest in the estate; that he was ignorant of his interest and was asserting no claim; that he was without business experience and relied entirely on his agent Dean, who was set in motion by the agent of defendant; that the deed and assignment were prepared at the instance of the defendant, and plaintiff was induced to refrain from talking with his uncle, with whom he lived; that the consideration paid was \$500, while the interest of defendant in the property was from four to ten times that amount; that he was led to believe that the interest assigned was in his father's estate and not his grandmother's; that it was of little value, heavily incumbered and likely to be lost by foreclosure. The defendant understood the value of plaintiff's interest. The plaintiff in his complaint and at the trial offered to return the amount paid with interest.

*Held*, that the plaintiff was deceived by misrepresentation of material facts and was entitled to rescind and have the deed and assignment canceled on returning the amount paid.

APPEAL by the plaintiff, Edward Cramsey, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 22d day of June, 1905, upon the decision of the court rendered after a trial at the New York Special Term.

*L. E. Warren* [*George W. Bristol* and *Woolsey Carmalt* with him on the brief], for the appellant.

*John K. Creevey*, for the respondent.

LAUGHLIN, J. :

The action is brought to set aside a conveyance of the plaintiff's interest in certain real estate owned and devised by Harriet Cramsey,

deceased, and an assignment of his interest in her estate to the defendant, Charles A. Sterling, on the ground that he was induced to execute the deed and assignment by false and fraudulent representations. The plaintiff claims to be the grandson of said Harriet Cramsey, and the son and only heir at law of her son Benjamin F. S. Cramsey, who survived her and died on the 2d day of July, 1902, prior to the execution by the plaintiff of said deed and assignment.

The will of said Harriet Cramsey directed her executors to divide her residuary estate into five parts, and set aside and invest one of the shares and pay the net income thereof to the use of her son Benjamin F. S. Cramsey — designated in the will as Benjamin D. Cramsey — during his life, and upon his death she gave the principal “to his children then living” and to the issue of any deceased child of his *per stirpes*; and in the event of his dying without leaving children, or the issue of children him surviving, she gave the principal to his surviving brothers and surviving sisters and the issue of a deceased brother or sister *per stirpes*. The testatrix also left another son and two daughters, and she made a like provision for each of them and their issue. Her husband also survived her, and she directed that one of the shares be likewise set apart for his benefit during life with the remainder over to her four children and their issue. The residuary estate has not been divided into five separate shares, as directed in the will. The decedent at the time of her death owned the premises situated at the northeast corner of Lexington avenue and Eighty-fourth street, having a frontage on Eighty-fourth street of thirty-six feet eight inches and extending in depth one hundred and two feet two inches. The conveyance, sought to be set aside is of the plaintiff's interest in this parcel of land, which is claimed to be one-fifth, subject to the life interest of his grandfather in the income of one-fifth part thereof.

The action is defended on the ground that the execution of the deed and assignment was not procured by fraud, and also upon the ground that the plaintiff is not the lawful issue of the son of the testatrix.

The plaintiff did not solicit the purchase of his interest in either the land or the estate by his grantee and assignee. The transfer of

App. Div.]

First Department, March, 1906.

his interest was solicited by the latter. The deed prepared at the instance of Sterling, the grantee — who is a grandson of the testatrix and had every opportunity of obtaining information as to his relatives — contains the recital concerning the plaintiff, who was the party of the first part, "Edward Cramsey, commonly known as Edward Farrington, son of Benjamin F. S. Cramsey," and the assignment, likewise prepared at the instance of the assignee, contains a recital that Benjamin F. S. Cramsey became entitled, under the will of Harriet Cramsey, to the income of a certain trust fund, the principal of which was bequeathed to his surviving children or their issue, and that he died on the 2d day of July, 1902, "leaving him surviving Edward Cramsey, commonly known as Edward Farrington, his only child and heir at law," who was by virtue of said will then entitled "to the principal of said trust fund as well as to certain other interests in and to the estate of said Harriet Cramsey." The consideration recited in the deed is \$1, and that recited in the assignment is \$500. The entire consideration paid to the plaintiff for the execution of both instruments was \$500. The plaintiff offered in the complaint to return it with interest from the 22d day of October, 1902, the day on which it was paid to him, and duly tendered the amount in open court during the trial. The tender was refused and defendant declined to reconvey the premises or reassign the interest in the estate.

Assuming the plaintiff to be the sole heir of Benjamin F. S. Cramsey, the assignment transferred a claim to \$132.70, his share of net rents collected and on hand, and he owned a one-fifth interest in the real estate then vested in possession, and a one-fourth interest in still another fifth, subject to the life use of his grandfather, who was then eighty-two years of age. The evidence as to the fair market value of the premises varies from \$30,000 to \$60,000, and they were mortgaged for \$19,000, leaving the equity worth from \$11,000 to \$41,000. One witness, the father of the defendant, testified that at a forced or foreclosure sale the premises would not bring over \$26,000 or \$27,000, subject to a \$19,000 mortgage. It is claimed that he meant that the equity on such a sale would only bring \$7,000 or \$8,000, but that is not entirely clear, and even so, this was not a forced sale and it was not to a party interested in the mortgage and there is no evidence that a foreclosure action

was threatened or even that there was a default in any payment secured by the mortgage. It thus appears on the undisputed evidence that the interest of the plaintiff in the estate and in the premises, assuming him to be the sole heir of said Benjamin F. S. Cramsey, as recited in the assignment and deed, was worth, even at a forced sale, about four times what he received, and the fair inference from all the testimony is that it was reasonably worth about ten times what he received. It is to be borne in mind that the defendant had no other interest in the premises or in the estate, and that since the assignment and deed his claim has been recognized to the full extent as the successor in interest to the sole heir of Benjamin F. S. Cramsey. The conveyance and assignment were solicited and executed on the assumption that the plaintiff was such sole heir. It is difficult to perceive on what legal theory the defendant may retain the fruits of the assignment and conveyance, if they were procured by fraud, and place upon the plaintiff, as a further condition precedent to his right to be restored to his former position which would enable him to assert and establish his right and interest as against the claimants thereof, the burden of showing in this action that he is the legitimate son and sole heir of said Benjamin F. S. Cramsey. Assuming, but without deciding, however, that this burden rested upon him, we are of opinion that he sustained it, not as matter of law, but by a fair preponderance of the evidence. The only evidence tending to show the contrary is the testimony of the defendant's father, who, according to the testimony of the defendant, represented him in the investigation as to the existence of an heir to Benjamin, and accepted the identification of the plaintiff as such, and for some reason not satisfactorily explained, suggested that the assignment and conveyance run to the defendant, upon the ground that defendant "had better buy it, because some one had to buy that interest, and it would not look just right for him to buy it." The defendant further testified, when asked what his father meant by that statement: "A man can use his own judgment in a question of that kind." An uncle of the plaintiff on his mother's side testified unequivocally that plaintiff's mother and said Benjamin lived with her parents at Nos. 123 West One Hundred and Twenty-seventh street and 332 East One Hundred and Nineteenth street, as hus-

App. Div.]

First Department, March, 1906.

band and wife, from about the 18th day of November, 1877, until about two months after the birth of the plaintiff, and that during said period Benjamin introduced plaintiff's mother to relatives, friends and the neighbors as his wife, and she was known as Mrs. Cramsey, and that plaintiff was born to them at said last-mentioned residence on the 16th day of July, 1879. Another uncle to plaintiff, the brother to said Benjamin, whose interest is clearly adverse to that of the plaintiff, gave testimony substantially corroborating this evidence, and showing that on the invitation of his brother Benjamin, he called there to see their child, the plaintiff. The testimony of another witness, one Brown, a real estate agent who was employed and paid by defendant's father to locate the plaintiff and procure the deed and assignment, clearly shows that he had knowledge of the existence of plaintiff as the son of Benjamin. The plaintiff had an interest, as the heir to his mother, to premises No. 325 East One Hundred and Twenty-third street, New York, which a real estate agent named Dean had had charge of for several years for him and his uncle. According to the testimony of Dean, said Brown came to him and inquired if he knew "Edward Farrington, \* \* \* or a person answering to that name," and thereby the plaintiff, who after his parents separated soon after his birth, removed with his mother's parents to Dover, N. J., and was there brought up under her name, was located and induced to execute the assignment and conveyance.

The testimony of the defendant's father is to the effect that he never heard of the marriage of his brother-in-law with plaintiff's mother, and that at the time when, according to the other evidence in the case, they were living together as husband and wife with her parents, Benjamin was living elsewhere. When Brown first came to him, however, and suggested the existence of an heir to Benjamin, the father of the plaintiff, according to the testimony of Brown, he said: "If there ever was such a person, they were not in existence now." Yet he said to Brown, in substance, that if he found such heir he would give \$500 for his interest, and for the defendant he subsequently accepted the proof of the identity of plaintiff as such heir and paid the consideration for the transfer and also paid Brown for his services.

Plaintiff's mother held a paper which she evidently regarded as a

valid certificate of marriage, certifying that she was married to said Benjamin F. Cramsey according to the laws of the State of New York at West Farms, which was just across the bridge over the Harlem from where they lived, on the 18th day of November, 1877, and she showed this to her brother within a week of that date and of the time she began to cohabit with said Benjamin. This certificate was not in the form required by the statute to make it competent evidence of the marriage; but she kept it with her private papers as religiously as if it was a valid document, and with it was found on her death a certificate of baptism, purporting to have been made by "L. S. Weed, Pastor 2d Ave. and 119th St. M. E. Church," and showing baptism on the 28th day of March, 1880, of "John Edward, infant son of Frank and Ella R. Cramsey, born in New York city on the 16th day of July, 1879." Benjamin Cramsey was known as Frank and is so designated in his mother's will.

The age of legal consent for females to marry at that time was fourteen years (See Laws of 1841, chap. 257), and according to the undisputed evidence the plaintiff's mother was then sixteen or seventeen years of age. The testimony of defendant's father, even if accepted, does not necessarily show that there was no marriage between Benjamin and plaintiff's mother, but it is somewhat inconsistent therewith. His testimony, however, is not convincing. It does not bear the impress of frankness and is inconsistent with his acts. He does not concede that he had any knowledge of acquaintance or intimacy between his brother Benjamin and plaintiff's mother, and he professes ignorance alike of their marriage and of the birth of plaintiff. He testifies that to his personal knowledge his brother resided and was elsewhere, and he specifies the places, than at the residence of plaintiff's mother's people during all the time it is claimed, upon the other evidence in the case, that they lived and cohabited together there as husband and wife. Clearly, according to his testimony, the plaintiff had no interest in the estate or premises. The plaintiff was not aware of his interest and was asserting no claim. It is not probable that, in these circumstances, the defendant's father would have encouraged Brown to find plaintiff and open negotiations for the purchase of his interest for \$500, on the theory and direct recital contained in



App. Div.]

First Department, March, 1906.

the assignment and deed that he was the sole heir of Benjamin. Defendant's father is also flatly contradicted by the testimony of the attorney of record for the plaintiff, who testifies to an admission to him of the marriage, and of the birth of plaintiff, and the expression of opinion — as he did to Brown — that the boy was dead. The evidence very satisfactorily shows that Benjamin was the father of the plaintiff — the trial court has in effect so found by finding that plaintiff did not know how to spell *his own name*, *Cramsey* — and that this was well known to the relatives and neighbors. The only question open to serious argument is the marriage of the plaintiff's parents. The evidence shows that plaintiff's father was addicted to the use of liquor, and had served a term of six months on Blackwell's Island on conviction of some crime, the nature of which is not disclosed by the record. In these circumstances it is not surprising that his parents separated, and it is not strange that the father took no further interest in the mother and child. Nor is the evidence of the marriage impeached by the fact that the mother, on moving into a new neighborhood in another State, resumed her maiden name and let her son take her family name also, as if by adoption by her father, which was admitted upon the trial and of which there is some indication in the record.

It appears that plaintiff has never attended school and can read and write only a little. He was allowed by his mother and her parents, with whom he lived, to grow up in ignorance. These facts are relied upon by the respondent as indicating the illegitimacy of the plaintiff. We do not regard them as significant evidence on that point. There is not a word of testimony in this record to impeach the chastity or respectability of the plaintiff's mother. She never resided outside of her parents' house. The intercourse that resulted in the birth of the plaintiff took place openly under her father's roof, and on the representation by her and Benjamin, and the assumption by the other members of the household, neighbors and friends, that they were married. Even after the separation, which appears to have taken place at the instance of plaintiff's mother and for cause, and not upon the initiative of Benjamin, or under any claim that there was no legal obligation to remain, she was not cast out by her parents and brother, but both she and the child remained ever afterwards with them. There is no evidence

tending to show that the failure to educate the plaintiff was owing to a lack of interest in him. It is quite as reasonable to infer that it was owing to a failure to appreciate the advantages of education, or other causes. The fact that plaintiff's father subsequently lived with another woman many years as his wife does not disprove the first marriage. The first may have been legally canceled, or there may have been no second marriage. The inference that there was a lawful contract of marriage between plaintiff's parents is justified and presumed from the evidence of open cohabitation as man and wife in her father's house, and her introduction to friends and neighbors under Cramsey's name and as his wife (*Tracy v. Frey*, 95 App. Div. 579; *Gall v. Gall*, 114 N. Y. 109; *Badger v. Badger*, 88 id. 546; *Hynes v. McDermott*, 91 id. 451); and we think the finding that the contract of marriage was not proved is against the weight of the evidence.

The remaining question, which, as already intimated, it would seem should be the only question, is whether there has been sufficient proof of fraud or mistake to warrant the *rescission* of the deed and assignment. It has been seen that the consideration was utterly inadequate, so much so as to give rise to a suspicion, at least, that the contracts are oppressive. It clearly appears that this uneducated young man, who was without business experience, relied entirely on the representations of his real estate agent, Dean, whom Brown, representing the defendant, set in motion. These representations were made to Dean by Brown, and although the defendant may not have authorized them all, yet *for the purposes of this action to rescind*, he is chargeable therewith and cannot retain the property, the transfer of which was induced by either false or fraudulent representations. (*Bedell v. Bedell*, 37 Hun, 419; *Page v. Krekey*, 137 N. Y. 312; *Green v. Roworth*, 113 id. 462; *Kountze v. Kennedy*, 147 id. 124.)

Prior to the trial, which was on November 7, 1904, the defendant had received by virtue of the assignment and deed \$750.81 as his share of net rents from the premises. Material representations were made to plaintiff, on which he relied, which were erroneous, if not fraudulent, in several particulars. It was represented that the interest was in his father's instead of his grandmother's estate; that his interest was so small that he possibly would not get anything

out of it ; that it was perishable ; that the property was mortgaged for \$20,000, which was high, and the mortgage could be foreclosed and his interest wiped out ; that it was also contingent and subject to a life estate ; and that he could get \$500 for his interest. The defendant and Brown knew all the facts and the value of plaintiff's interest. Brown and Dean were well acquainted, and the former induced the latter to endeavor to procure an assignment of plaintiff's interest and the deed for \$500. Dean, without investigation or inquiry, accepted the facts as stated by Brown, and assured the latter that the money would be very acceptable to the boy, and he felt confident that he would execute the papers. Dean communicated the substance of these representations to the plaintiff and advised him to accept the \$500, and he assented. A letter from Dean to the plaintiff, printed in the record as Exhibit C, indicates that Dean and Brown had some understanding by which the former was employed to represent the defendant, or to aid Brown, and that they purposely deceived the plaintiff and induced him to refrain from even consulting his uncle with whom he was living. The effort was successful and plaintiff executed the papers without taking counsel or acquiring further information. He does not dispute that the deed and assignment were read over to him ; but he could not read them, and apparently did not understand them, for he evidently labored under the impression that he was assigning some small interest in some insignificant estate left by his dissolute father ; and it is important on this point to bear in mind that the extent of his interest in the estate and in the premises is not specified in the assignment or deed.

Taking the most charitable view of the conduct of Brown and Dean, the plaintiff was deceived by misrepresentations of material facts, and is entitled to rescind on returning the amount paid and interest, which he has duly tendered, and to have the deed and assignment procured thereby canceled.

Moreover, it is to be remembered that this is an action *to rescind*, not *to reform* a contract, where proof of fraud or mutual mistake is essential. It does not matter whether the information upon which the plaintiff acted was fraudulent or not, it is sufficient that, without negligence on his part, he was led to believe and did believe

First Department, March, 1906.

[Vol. 111.]

that material facts were different, and that there is no element of estoppel in favor of the defendant to lead the court to refrain from granting a rescission.

It follows that the judgment should be reversed and a new trial granted, with costs to appellant to abide event.

O'BRIEN, P. 'J., PATTERSON, McLAUGHLIN and HOUGHTON, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event. Order filed.

---

MISHKIND-FEINBERG REALTY COMPANY, Plaintiff, v. LOUIS SIDORSKY,  
Defendant.

First Department, March 9, 1906.

**Real property — action for specific performance of contract to purchase — when vendor's title obtained through foreclosure is marketable though service by publication was irregular — when irregularity in such service not vital — order of publication amended *nunc pro tunc*.**

The title of a purchaser of real estate on foreclosure is marketable, although at the time the summons in the action of foreclosure was served by publication upon one of the defendants it had been ordered that a supplemental summons issue to bring in certain tenants, which supplemental summons was not served on said defendant, who was served only with the original summons, which named her as defendant. Such defendant having been summoned to answer on her own account, it is immaterial that the summons did not contain the names of tenants made parties only to foreclose their rights as such.

Neither is the title unmarketable because the order of publication required "notice of object of action" to be served instead of the "complaint," as required by section 440 of the Code of Civil Procedure, if in fact the complaint was served together with such notice of object of action and the order of publication thereafter was corrected and filed *nunc pro tunc*.

While an order cannot be made *nunc pro tunc* to supply a jurisdictional defect by requiring to be done something which has not been done, such order may be so corrected when the thing has in fact been done.

INGRAHAM, J., dissented, with opinion.

**SUBMISSION of a controversy upon an agreed statement of facts, pursuant to section 1279 of the Code of Civil Procedure.**

App. Div.]

First Department, March, 1906.

*Arnstein & Levy* [*Emil Goldmark* of counsel], for the plaintiff.

*J. A. Seidman*, for the defendant.

CLARKE, J.:

This is a submission of a controversy upon an agreed statement of facts, pursuant to the provisions of sections 1279-1281 of the Code of Civil Procedure. The parties entered into a contract in writing and under seal, under which the defendant agreed to sell and the plaintiff agreed to buy a certain piece of land with the buildings thereon situated in the city of New York and known as 217 East One Hundred and Second street. The defendant agreed to deliver "a proper deed containing the usual full covenants and warranty for the conveying and assuring to the party of the second part, or the assigns of the party of the second part, the fee simple of the said premises free from all incumbrance except as herein stated." The plaintiff raised certain objections to defendant's title, and the sole question here is: Is the title marketable?

The defendant acquired title through mesne conveyance from one Donald, who was the purchaser upon a foreclosure sale. On the 29th of June, 1897, one Pollock, the then owner of the fee, executed and delivered his bond and mortgage to Peter Donald for the payment of \$14,000 on the 29th day of June, 1902, with interest at five per cent, payable semi-annually. Said mortgage was duly recorded. Thereafter said Pollock conveyed said premises to one Rickerson, and on May 24, 1899, Rickerson conveyed to Herman Rosenblum, who became the owner subject to said mortgage. On July 3, 1899, said Rosenblum executed a mortgage to Sigmund Cohn for \$500. On October 31, 1899, Herman Rosenblum executed a mortgage to Simon Rosenblum for \$3,000. This mortgage was assigned to Mollie Weinberg, and on November 2, 1900, Mollie Weinberg assigned said mortgage to Mary Rabinovitch, the assignment being recorded November 7, 1900. On November 14, 1900, Peter Donald commenced an action to foreclose the first mortgage for \$14,000 for non-payment of interest. The owner of the equity, Herman Rosenblum, and his wife, Sigmund Cohn, the owner of the second mortgage for \$500, and Mary Rabinovitch, the assignee of record of the third mortgage, as well as other parties, were made parties defendant. On December 4, 1900, an order was made and entered

directing that the summons and complaint be amended by striking out two unnecessary defendants and by adding twenty-eight others, all of whom were tenants of the premises sought to be foreclosed, and accordingly a supplemental and amended summons and complaint were on that day issued. The said supplemental and amended summons named all the old defendants, except those two stricken out, and all the new defendants, but was directed to the new defendants only. Thereafter, and on January 29, 1901, an order was made directing that the summons be served upon the defendant Mary Rabinovitch by publication. The affidavits upon which the order was made sufficiently showed the non-residence of said defendant, and that her then address was No. 12 Fair street, Paterson, N. J. The order provided "that service of the summons in the above-entitled action upon the said defendant Mary Rabinovitch be made by publication thereof in two newspapers. \* \* \* That on or before the day of the first publication as aforesaid plaintiff deposit in the general post office in the Borough of Manhattan, City, County and State of New York, a copy of the summons and notice of object of action hereto annexed and of this order contained in a securely enclosed postpaid wrapper directed to the said Mary Rabinovitch at No. 12 Fair Street, Paterson, New Jersey." There was deposited in the post office, directed as required, on the 16th day of February, 1901, the summons as originally made and served on the other defendants, that is, containing the name of Mary Rabinovitch and others, but not including the twenty-eight tenants as to whom the supplemental summons was directed to be issued. To this summons was attached a notice directed to the defendant Mary Rabinovitch as follows: "The foregoing summons is served upon you by publication, pursuant to an order of the Hon. P. Henry Dugro, a Justice of the Supreme Court of the State of New York, dated the 29th day of January, 1901, and filed with the complaint in the office of the clerk of the County of New York on the 5th day of February, 1901, at the Court House in the Borough of Manhattan, New York." There was also inclosed and mailed notice of object of action, notice of order of publication, complaint, affidavits and order of publication, and order amending order of publication.

Thereafter and on May 3, 1901, judgment of foreclosure and sale was entered and a referee appointed to sell, who, on May 28,

App. Div.]

First Department, March, 1906.

1901, after due notice of sale, sold the premises to the plaintiff in said action, Peter Donald, for \$13,400, resulting in a judgment for deficiency for \$3,061.52.

The first objection raised was that at the time of the order of publication of the summons, as against Mary Rabinovitch, a supplemental and amended summons had been ordered to be issued containing the names of the twenty-eight tenants of the premises; that the publication and depositing in the post office of the original summons was not the publication of the summons in the action. It seems sufficient to say that, so far as she was concerned, she was named in the original summons, and, being summoned to defend the action on her own account, it does not seem a matter of moment that the names of the tenants of the property, made parties only for the purpose of foreclosing their rights, if any, under their tenancies, could in any way affect her.

The second objection was that the order of publication did not conform to the provisions of section 440 of the Code of Civil Procedure. The part of that section material to this objection is as follows: "It (the order) must also contain \* \* \* a direction that on or before the day of the first publication the plaintiff deposit in a specified post-office one or more sets of copies of the summons, complaint and order, each contained in a securely closed postpaid wrapper directed to the defendant at a place specified in the order." The order complied with that provision, with the exception that, instead of the word "complaint," it said "notice of object of action hereto annexed." As matter of fact, the order was complied with by mailing the notice of object of action, and the purpose of the statute was complied with by mailing also the complaint. Subsequent to this, objection being taken, and on August 19, 1904, on notice to all the parties who had appeared, an order was made and entered in said action amending said order "*nunc pro tunc*" as of the original date by striking out the words "notice of object of action" and inserting the word "complaint," upon proof being presented that a complaint as well as notice of object of action was mailed to the defendant Mary Rabinovitch, and that the words "notice of object of action" were used in said order by oversight and mistake, and were due to a clerical error, and that the word "complaint" was intended to be used.

Plaintiff claims that no jurisdiction was ever acquired over Mary Rabinovitch because the order of publication was jurisdictionally defective. Two recent cases in this court are cited by plaintiff. In *Eleventh Ward Bank v. Powers* (43 App. Div. 178) it appeared that the order did not specify the post office in which the copy of the summons, complaint and order were to be deposited. It did not direct that a copy of the order be mailed to the defendant to be served. It did not direct that the order be served on or before the day of the first publication of the summons. No copy of the order was mailed to the defendant, and this court held on those facts that there was no service. In *Stuyvesant v. Weil* (41 App. Div. 551) the objection was that the defendant's title was defective, as the defendant claimed under a certain mortgage foreclosure wherein the owner of the equity of redemption "was not named as a party defendant in either the summons or the complaint," and did not appear therein prior to the entry of judgment, and the court, therefore, had no jurisdiction of the person of said owner. It appeared that the name of the owner of the equity was Mary J. Stockton, and that in the foreclosure proceedings the summons and complaint named Emma J. Stockton, instead of Mary J. Stockton, and as so written they were served on Mary J. Stockton, who did not, however, appear or answer at any time before the judgment or sale. Subsequently an *ex parte* order was entered "that the summons and complaint, and all other papers herein, be amended by striking out the name 'Emma J. Stockton' where the same appears and inserting in lieu thereof the name 'Mary J. Stockton' as one of the defendants in this action." No amended notice of pendency of action was filed, nor was any amended or supplemental summons issued or served. The court said: "The person served by the wrong name never appeared, and unless the court obtained jurisdiction it is difficult to determine upon what principle it could amend and thereafter proceed to determine the rights of the parties. \* \* \*

If here, intending to sue Mary J. Stockton, the summons had included the name of Emma J. Brown, it would not be claimed in a suit intended to affect the former and in which she was actually served with the summons directed to Emma J. Brown, that the court, without her appearance, thereby acquired jurisdiction over her. 'Emma J. Stockton' may be nearer to the name of the per-



App. Div.]

First Department, March, 1906.

son intended than 'Emma J. Brown,' yet if it is sufficient merely to have the right person served, regardless of having them correctly designated in the summons, then seemingly there would be nearly as strong argument in favor of sustaining the jurisdiction of the court in one case as the other. Mary J. Stockton would be no more required to attend a summons issued as against Emma J. Stockton than she would be if it were issued against Emma J. Brown. In each instance it is directed to another person," and held the title unmarketable. Upon appeal to the Court of Appeals (167 N. Y. 421) the judgment of this court was unanimously reversed, the learned chief judge concluding his opinion with these words: "We have not alluded to the decisions of the several Special and General Terms which the Appellate Division felt called upon to follow. Their foundations were laid long before sections 721 and 723 of the Code came into existence as marking features of a distinct legislative policy to stop the sacrifice of things of real substance upon the altar of mere technicality, and hence a discussion of them can serve no useful purpose."

It seems to me that beyond question it would be "the sacrifice of things of real substance upon the altar of mere technicality" to destroy a title to real estate because an order required the deposit in the post office of a notice of the object of the action, instead of a copy of the complaint, when as matter of fact not only the notice but the complaint as well and all of the other papers required by the Code to be served were so deposited. An order may not be made *nunc pro tunc* which will supply a jurisdictional defect by requiring something to be done which has not been done; but where the thing itself has been done, when the object looked at by the Code in requiring it to be done has actually been accomplished, the power to make the order express the fact does exist. The object in requiring that the order should contain a direction that the complaint should be deposited in the post office was that the complaint should be so deposited in order that the defendant might receive it and be placed in position to defend his rights upon the information so conveyed that they were attacked. That was done in the case at bar, and the proper and necessary papers were sent to the then present address of the defendant, which address appeared upon the recorded assignment of the mortgage in question, recorded only seven days

before the commencement of the suit, and stated by her attorney who attended to said assignment to be her then address.

Considering the facts in the case at bar, and considering not only the provisions of sections 721, 722 and 723 of the Code of Civil Procedure, but section 3345 as well, which expressly provides that "the rule of the common law that a statute in derogation of the common law is strictly construed does not apply to this act," and applying the doctrine of the Court of Appeals as expressed in the *Stuyvesant Case* (*supra*), I am of the opinion that the objections to the title are not well taken, and that judgment should go for the defendant upon this submission, with costs.

O'BRIEN, P. J., McLAUGHLIN and HOUGHTON, JJ., concurred; INGRAHAM, J., dissented.

INGRAHAM, J. (dissenting):

I do not think that a purchaser should be compelled to accept this title. The order of publication concededly fails to comply with section 440 of the Code of Civil Procedure. That section is mandatory and provides that the order must contain a direction that on or before the day of the first publication the plaintiff deposit in a specified post office one or more sets of copies of the summons, complaint and order, each contained in a securely closed postpaid wrapper, directed to the defendant at a place specified in the order.

This is not an order of the court, but an order of a judge, and it has been many times held that the order, to give to the court jurisdiction in the action, must strictly comply with this mandatory provision of the statute. The summons was published under this order, and the sole jurisdiction of the court to subsequently decree a foreclosure of the mortgage and a sale of the defendant's property who was sought to be served under this order, is the publication of the summons as therein directed. This defendant is not now before the court and the judgment in this action would not be binding upon her. The purchaser was entitled to a marketable title, free from serious doubt. I do not think that a title based upon a judgment entered in an action where the summons was served upon the owner of the equity of redemption pursuant to an order which fails to comply with this section of the Code is a marketable title. The order amending the order of publication entered long after the

App. Div.]

First Department, March, 1906.

judgment was entered, not made by the judge who signed the original order, I do not think cures the defect if the failure of the original order of publication was insufficient to give the court jurisdiction in the action.

I think, therefore, that as the plaintiff should not be compelled to take this title, judgment should be directed for the plaintiff upon this submission.

Judgment ordered for defendant, with costs. Settle order on notice.

---

JOHN McDONOUGH, Appellant, v. PELHAM HOD ELEVATING COMPANY, Respondent, Impleaded with JOHN CLARK, the Name "John" Being Fictitious, etc.

First Department, March 9, 1906.

**Negligence — injury while riding on an elevator used to hoist material — when plaintiff not fellow-servant of engineer — burden on plaintiff to show that he was rightfully upon elevator — failure to sustain such burden.**

The plaintiff, in the employ of a building contractor, was injured while riding on a hod elevator installed in the building for hire by the defendant elevating company, for the purpose of hoisting material.

*Held*, that the plaintiff, being in the employ of the contractor, was not the fellow-servant of the engineer who ran the elevator and who was employed by the elevating company;

That, as the elevator was not intended to carry passengers, the presumption was that the plaintiff was riding on it without the consent of the defendant, and that the engineer in permitting him to ride was acting outside the scope of his authority;

That the burden was on the plaintiff to show that he was rightfully upon the elevator with the defendant's permission, express or implied;

That such implied permission was not shown by the fact that the defendant's engineer consented that the plaintiff should ride, unless it were within the scope of his authority, which it was not, he being employed only for the special purpose of running the elevator for carrying material and not for carrying passengers;

That no custom to carry passengers binding on the defendant was shown by mere evidence that men rode on the elevator in this particular instance;

That, as plaintiff had failed to sustain such burden of proof, a dismissal of the complaint was proper.

APPEAL by the plaintiff, John McDonough, from a judgment of the Supreme Court in favor of the defendant, the Pelham Hod Elevating Company, entered in the office of the clerk of the county of New York on the 10th day of January, 1905, upon the dismissal of the complaint by direction of the court as to the said defendant after trial at the New York Trial Term.

*Goeller, Shaffer & Eisler* [*Robert Goeller* of counsel], for the appellant.

*Frederick E. Fishel* [*George Gordon Battle* of counsel], for the respondent.

CLARKE, J. :

This was an action to recover damages incurred by the alleged negligence of the defendant in operating a hod elevator which it had installed for hire in a building in process of erection. The plaintiff was an employee of the contractor for the erection of the building. The complaint having been dismissed it will be necessary to consider only the claims made by the plaintiff to show that the dismissal was error. We are all agreed that the plaintiff, the employee of the builder, was not a fellow-servant of the engineer of the defendant whose negligence is claimed to have caused the injuries complained of. The defendant furnished its elevator, boiler and engineer for an agreed price and there was no common employer or common employment, nor was the engineer the servant *ad hoc* of the builder. (*Mills v. Thomas Elevator Co.*, 54 App. Div. 124; *affd.*, 172 N. Y. 660.)

The plaintiff was injured by the negligence of the defendant's servant while riding on an elevator built and installed for the purpose primarily of carrying building materials to the different floors of the building in which plaintiff was at work. In view of the fact that this elevator was installed for the purpose of carrying building materials and the further fact that there were on it none of the safety guards or appliances to be found on a passenger elevator, the presumption is that the plaintiff was riding on it without the consent of the defendant. If such was the case plaintiff cannot recover, for defendant was under no duty to transport him from the ground floor of the building to the floors above, and if the engineer

App. Div.]

First Department, March, 1906.

attempted to do so he was acting entirely outside the limits of his authority and the defendant is not responsible for his negligent acts in so doing. The burden is, therefore, upon the plaintiff to show that he was rightfully upon the elevator, and in order to do this, that he was there with defendant's permission, either express or implied.

It is not contended that plaintiff had defendant's express permission to go up on the elevator. Was such permission implied? The presumption is that it was not because this elevator was not built to carry passengers. The plaintiff has not introduced sufficient evidence to overcome this presumption. He says that defendant's engineer consented to his going up on the elevator. This consent will not avail plaintiff unless the engineer in giving it can be said to have acted within the scope of his authority. He had not express authority to give this consent. Had he implied authority? He was not a general agent, but an agent put there for the special purpose of running a freight elevator. He was impliedly authorized to do all acts necessary to the carrying out of this special duty. Was it necessary for the accomplishment of this object for the engineer to carry plaintiff on the elevator? Plaintiff does not claim that he was taking any materials up with him or to have been on there for the purpose of keeping materials from falling off the elevator, or for the purpose of unloading the elevator when it got to the upper floors. He was on there simply for the purpose of getting to the sixth floor of the building. Clearly, carrying him on the elevator was in no way necessary for the accomplishment of the object which the engineer was intended to carry out.

Appellant contends that the engineer was put here by the defendant for the purpose of aiding in the quick construction of this building, and as carrying the plaintiff on the elevator enabled him to get more quickly to his work the engineer was acting within the scope of his authority. The answer to this argument is that the engineer was not put there for the purpose of doing everything that would aid in the quick construction of the building, simply those things in the line of his duties as an engineer of a freight elevator.

Appellant contends that the contract being silent as to whether or not passengers should ride on the elevator, the contract was subject to the known usages of the business and that it was shown that

carrying passengers was customary in this business. The answer to this argument is that there is no evidence in the record of a general custom of this nature; the only evidence is to the effect that the men did it in this instance, which is not evidence of a general custom in the business which should have been known to the defendant at the time it supplied this elevator. Appellant contends that since the men rode on this elevator openly and notoriously for weeks without the objection of the defendant, and not knowing the nature of the engineer's instructions in the matter, defendant is estopped to deny the engineer's authority and to claim that plaintiff was not lawfully on the elevator. There are two difficulties with this argument, first, that the cases cited in support of it are all cases of contracts made by the agent outside the scope of his authority where the principal has reaped the benefits thereof, and I have been unable to find any case which applies the doctrine of agency by estoppel to a case of this kind. The other difficulty with the argument is that this is not a case in which the plaintiff has been misled by the agents' acts into believing that the defendant authorized him to ride on this machine, for the machine was obviously dangerous, and that the plaintiff realized the danger is shown by his confessed reluctance to riding on it.

The only case cited by appellant which approaches an authority in favor of his contention is *Stringham v. Stewart* (100 N. Y. 516). That was a case in which plaintiff was injured while riding on a grain elevator. It appeared in evidence that plaintiff was in the employ of defendant, who owned the elevator, and that defendant's superintendent had directed the servants employed in moving grain to ride on the elevator while doing their work. It also appeared that on the trip in which plaintiff was injured he put on a load of grain and went up with it for the purpose of taking it off the elevator. In so doing he was working for the benefit of the defendant. These facts are sufficient to show that the case is not an authority in point. In the case at bar the plaintiff was not directed by the engineer of the defendant to go up on the elevator, and in going up on the elevator he could not be said to be in any way acting for the benefit of defendant, whose servant he was not.

In *Eaton v. D., L. & W. R. R. Co.* (57 N. Y. 382) it was held that conductors of freight trains cannot create any liability on the

App. Div.]

First Department, March, 1906.

part of their principal to a person taken by them on such trains unless the principal in some way assents to it, and that duty to be careful toward him could only spring up on the part of the principal by an act on the conductor's part coming within the scope of his authority. The case of *Morris v. Brown* (111 N. Y. 318) seems to be directly in point. In that case a civil engineer employed by the aqueduct commissioners got upon a car operated by the defendant as contractor for the construction of a tunnel at the Croton dam. The cars were operated by a stationary engine and cable to draw material out of a shaft. By the omission of defendant's servant to attach the cable to the car, or otherwise control its velocity, the decedent was thrown off and killed. Judge DANFORTH, speaking for an unanimous court, said: "As they (the cars) were not furnished for such use, so there was no permission from the defendants or any one of them that they might be so used. But it is said this permission might be implied, because the intestate and others had before ridden upon the cars. Without permission from or duty on the part of the defendants to give it, I cannot see how that result follows. On the contrary a person so using the car at each time took upon himself the risk and must abide by its condition and the quality of the attendant at the time he so used it, and was entitled only not to be led into danger.

"Negligence is an omission of care and caution in what we do. But the duty to be actively cautious and vigilant is relative, and where that duty has no existence between particular parties there can be no such thing as negligence in the legal sense of the term. The plaintiff was in no position to complain of the defendants or their servants. The frame and dump the intestate got upon was not a vehicle for his carriage, but an instrument of labor, a mere implement furnished by the defendants to their servants, as they might have provided a man with a basket or barrow, or a mule with panniers, to take out the refuse, as in former times was the custom in doing such work. \* \* \* The plaintiff had a right to be in the tunnel for its inspection. The contract put the defendants under no obligation to carry him into the tunnel, nor by it did he acquire any right to be upon the car. Nor did he acquire that right through any consent or act or acquiescence on the part of the defendants. All the witnesses agree that no permission was given by the defend-

ants; no evidence tends to show that they even knew the car was at any time so used. The brakeman of the car had known it, but neither his knowledge nor assent could bind the defendants. He was not their agent for that purpose. It is a general proposition that a master is chargeable with the conduct of his servant only when he acts in the execution of the authority given him. \* \* \* The deceased had, in fact, ridden upon the car; he had done so under no other permission, a volunteer, but in safety. In each instance, however, he must be deemed to have assumed the risk, and this last time he was unfortunate. The consequences of that misfortune should not be thrown upon the defendants."

The judgment should be affirmed, with costs.

O'BRIEN, P. J., PATTERSON, INGRAHAM and LAUGHLIN, JJ., concurred.

Judgment affirmed, with costs. Order filed.

---

In the Matter of the Judicial Settlement of the Account of Proceedings of ANN WILEY and Others, as Executors, etc., of GEORGE WILEY, Deceased.

ANN WILEY, Individually, and Others, Appellants; ELIZA E. ROXBURY, as Administratrix, etc., of CHARLES W. ROXBURY, Deceased, and Others, Respondents.

First Department, March 9, 1906.

**Will—residuary clause construed—absolute gift cut down by subsequent limitation—when next of kin of deceased residuary legatee not entitled to share in residuary estate.**

When a will and codicil, after making specific bequests, gives, devises and bequeaths the whole residuary estate to the testator's wife and to specifically named sisters, nephews and nieces, share and share alike, "and in case of the death of either my beloved wife, my sisters, my nieces or nephews before the whole of my estate shall be divided, then I direct the said residuary to be divided among the survivors only share and share alike," the general gift contained in the first part of said residuary clause is limited by the restriction contained in the latter portion. Hence, the next of kin of a residuary legatee who has died before the division of the residuary estate are not entitled to



App. Div.]

First Department, March, 1906.

take, but the whole must be divided among the survivors of the residuary legatees named.

A gift absolute in form may be cut down by a subsequent limitation disposing of the same property in a different manner upon the happening of a contingency. As said will in other clauses effected an equitable conversion of the realty into money, and by the carrying out of specific trusts postponed the division of the residuary estate, the whole instrument taken together shows an intention on the part of the testator to leave the residuary estate to the survivors of the legatees named.

HOUGHTON, J., dissented, with opinion.

APPEAL by Ann Wiley, individually, and others from certain portions of a decree of the Surrogate's Court of the county of New York, entered in said Surrogate's Court on the 26th day of June, 1905.

*Francis S. Williams* [*Clarence L. Barber* of counsel], for the appellants.

*Hamilton & Beckett* [*William H. Hamilton* of counsel], for the respondent, Eliza E. Roxbury, as administratrix, etc.

*Warren McConihe*, special guardian for the infant respondents, Grace E. Roxbury and others.

CLARKE, J. :

The sole point involved on this appeal is the proper interpretation of the residuary clause of testator's will. George Wiley died October 15, 1902, leaving a will dated June 13, 1899, and a codicil thereto dated July 5, 1901. His estate, consisting of both real and personal property, amounted to about \$350,000. He left a widow, no children, and collateral relatives. After providing for his debts, funeral and burial expenses, a specific devise of his house with a gift of \$5,000 to his wife, testator made gifts by the use of the same language in separate clauses, of pecuniary legacies and annuities, in favor of a sister-in-law, his two sisters, two nieces and two nephews, such gifts being of specified amounts "payable as soon after my decease as may be convenient, and the further sum of (specifying) dollars per year for the period of ten years after my decease." A like annuity was given to one George Gibson. The sums thus given to these legatees outside of their annuities aggregate \$15,000, and the annuities themselves, figured for the ten years,

aggregated \$43,500. After making several further pecuniary gifts aggregating \$10,000, the will in the 22d clause directs the executors "to set apart out of my estate a sum sufficient in principal to pay all the annuities that I have heretofore bequeathed in this my will," and in the 23d clause directs and empowers the executors "to sell any and all real estate of which I may die possessed (except the house given to his wife) and to convert the same into cash or mortgages." By the 25th clause of the will, as executed, he provided that if any of the annuitants should die the amounts of said annuities should be paid to their next of kin or legal representatives during the time limited, but apparently having been advised that this provision was illegal as suspending the absolute ownership for more than two lives, by his codicil he revoked said 25th clause and provided: "In case any of the beneficiaries to whom I have bequeathed any sum in this my will, either payable as soon after my death as may be convenient, or payable to them in ten annual installments, shall die before they become entitled to the whole or any part of the said bequests given to them under my said will, then I direct that such part of the legacy bequeathed to them herein which cannot or has not been paid to them, by reason of their death, shall be paid to their next of kin or legal representatives as soon after their respective deaths as may be convenient to my executrices and executors, it being my intention that the said sum given to the various legatees and payable in ten annual installments shall not be held in trust for a period longer than the lives of the said legatees respectively."

The 26th clause is as follows: "All the rest, residue and remainder of my property and the interest which may be received from the sums set apart to pay the legacies hereinbefore devised, I give, devise and bequeath to my beloved wife, Ann Wiley, my sisters Mary Wiley and Elizabeth Wiley Gibson, my nieces Minnie Gibson and Sarah Roxborrow, and my nephews Charles Roxborrow and Frank Assmus, to be divided among them share and share alike, and in case of the death of either my beloved wife, my sisters, my nieces or nephews before the whole of my estate shall be divided, then I direct the said residuary to be divided among the survivors only share and share alike."

It is conceded that when the testator wrote Roxborrow he

App. Div.]

First Department, March, 1906.

intended Roxbury. All of these residuary legatees were alive at the date of the death of the testator, October 15, 1902. One of them, Charles W. Roxbury, was killed on July 11, 1903. At the time of said Roxbury's death no part of the residuary estate had been divided by the executors among the residuary legatees. Roxbury left surviving him a widow and four infant children. The executors when they came to make a division and distribution of the residuary estate divided it between the six remaining legatees. The learned surrogate has determined that "Charles W. Roxbury having outlived the testator, became, upon the death of the latter, immediately entitled to an indefeasible vested one-seventh interest in such first part of the residuary estate and its proportional share of the net income of such estate from the date of the death of the testator, together with one-seventh of any interest that accrued before his death from the sums required to be set apart to pay the annuities. This part of decedent's estate, which represents all that Charles W. Roxbury is entitled to under the residuary clause of the will, passed upon his death to his administratrix and she is now entitled to receive the same." Three of the six surviving residuary legatees appeal from so much of the decree as puts into effect the surrogate's interpretation of the clause in controversy.

In *Williams v. Jones* (166 N. Y. 532) the court said: "The intention of the testatrix must be our absolute guide in construing her will. Such is the mandate of the statute, and that principle is so firmly established by the decisions of this and other courts as to render any citation of authorities needless." Examining the will at bar we find the childless testator intent upon caring for his wife, his two sisters, his sister-in-law, two nephews and two nieces. For we may dismiss the specific legacies for small amounts from this consideration. To his wife he gave absolutely his house and its effects and \$5,000. To the six others who were the object of his special care he gave various sums outright. To these six he also gave annuities for ten years after his decease. He then provided that in case of the death of any of the beneficiaries to whom he had bequeathed any sum in his will before they had become entitled to the whole or any part of the said bequests, such part of the legacy bequeathed should be paid to their next of kin or legal representa-

tives as soon after their respective deaths as may be convenient. Having by codicil expressly revoked the 25th clause of the will which had attempted to continue the annuities of the next of kin or legal representatives of the annuitants in case of their death before the expiration of the term limited by the provision last cited, making the principal vest in the next of kin immediately on the death of the annuitant, he specifically in said codicil ratified and confirmed his said will in each and every particular, except as modified by the codicil. He, therefore, clearly had in mind, so far as the specific bequests and the annuities were concerned, the possibility of the death of said beneficiaries, both before his own decease and also thereafter and before enjoyment, and as to such specific legacies and annuities provided that they should not lapse but should pass to the next of kin. But when it came to the disposition of the bulk of his estate, the residuum, "all the rest, residue and remainder of my property and the interest which may be received from the sums set apart to pay the legacies," his purpose was quite different and was expressed in language so clear and apt as to leave, as it seems to me, no room for argument as to its intent. This estate he intended his wife and the six relatives named to share and enjoy. He knew them. He was concerned about them. These were the chosen objects of his bounty. For their children, born or unborn, or more remote kin, he had no care. And in express terms he provided that if any of them should die before distribution, then the residuary should be divided among the survivors only, share and share alike. It is quite true that if the residuary clause had stopped in the middle there would have been a complete and absolute gift, title to the appropriate share in the residue would have vested at the time of the death of the testator, no matter how much time might have elapsed before distribution, and would have been transmitted to the next of kin of any residuary legatee dying before such distribution. But the said clause did not stop in the middle, but, following a comma, it went on, "and in case of the death of either my beloved wife, my sisters, my nieces or nephews before the whole of my estate shall be divided, then I direct the said residuary to be divided among the survivors only share and share alike." We are to interpret the will of the testator, not to make a will for him. We are to find his intent from the language he used. The last expression

App. Div.]

First Department, March, 1906.

of his desire as to the distribution of the greater part of his estate was that it should go to the survivors only of the carefully enumerated objects of his special care when the time for distribution came. We have no right to erase those words from his will.

There is no legal objection to this scheme of the testator. There was by the will an absolute conversion of the real estate into personality as of the time of the testator's death, and the several distributees took their interests as money and not as land. The title to the shares vested upon the death of the testator in the residuary legatees, subject to a limitation over to the survivors in case of death before the period of distribution. In *Robert v. Corning* (89 N. Y. 225) the court said: "The postponement of the distribution, which was contemplated, was for the convenience of the estate to enable the executors advantageously to convert the property. \* \* \* The limitation over to the issue of any child dying before the distribution, was the limitation of a future contingent estate to such issue." In the will at bar a conversion of the real estate into cash and mortgages was required. The executors were given full discretion "to determine whether the said property shall be sold at public or private sale for all cash or part cash or part mortgage." The several bequests of specific amounts were all made payable at the convenience of the executors. These provisions indicate a knowledge on the part of the testator that the settlement of this estate would require time and that he intended such a deliberate settlement as should secure the best returns from the property sold. These provisions strengthen the conclusion I have reached and lend great force to the words "in case of the death \* \* \* before the *whole* of my estate shall be divided." It is settled beyond question that where there is a devise or bequest to one person in terms which would pass the fee or an absolute estate, if there were no words of limitation, and there is a subsequent provision giving the same estate to another upon the happening of a contingency, the devise or bequest over will take effect. In *Norris v. Beyea* (13 N. Y. 273) it was held that "There is in truth no repugnancy in a general bequest or devise to one person, in language which would ordinarily convey the whole estate and a subsequent provision that upon a contingent event the estate thus given should be diverted and go over to another person.

The latter clause in such cases limits and controls the former, and when they are read together, it is apparent that the general terms which ordinarily convey the whole property are to be understood in a qualified and not an absolute sense. \* \* \* So familiar is the doctrine that a limitation may be engrafted upon a devise in fee, that it is that circumstance which forms the distinction between remainders and executory devisees.\*" In *Tyson v. Blake* (22 N. Y. 558) it was said: "A general bequest of personal estate like a fee in lands, can be subjected to a limitation over on a condition which is not too remote. If the direction is that it shall go to another beneficiary on a contingency which must happen at the death of the first taker, the limitation is within the rules of law and will be sustained." In *Oxley v. Lane* (35 N. Y. 340) the will read: "I will, order, devise and bequeath that if either of my said sons or daughters, or if both of my said grandchildren shall die without issue before the final distribution of my estate at the end of twenty-five years after my decease as aforesaid, that the share of the party or parties so deceased shall be shared equally among all my other children, share and share alike." The court said: "It qualifies the absolute title and estate previously given to such deceased child or grandchildren by a conditional limitation in favor of all the children of the testator then surviving. \* \* \* This subsequent limitation over is not repugnant to the prior devises and bequests, although they are in language denoting an absolute gift of the whole estate in fee, and it will be sustained as a valid executory gift \* \* \*." It is hardly necessary to cite the numerous cases supporting executory devises and conditional limitations. The rule has not been changed by later cases. "The appellant's counsel invokes the rule of construction that when there is a bequest to one person absolutely, and, in case of his death without issue to another, the contingency referred to is a death in the lifetime of the testator. But this rule has only a limited operation and cannot be extended to a case where a point of time is mentioned other than the death of the testator to which the contingency can be referred, or to a case where a life estate intervenes, or where the context of the will contains language evincing a contrary intent. (*Vanderzee v. Slingerland*, 103 N. Y. 47; *Matter of N. Y., L. & W. R. Co.*,

\* *Sic.*

App. Div.]

First Department, March, 1906.

105 id. 89; *Fowler v. Ingersoll*, 127 id. 472; *Mead v. Maben*, 131 id. 255; *Mullarky v. Sullivan*, 136 id. 227.)” (*Matter of Denton*, 137 N. Y. 428.) “Where after a devise and bequest in language denoting an absolute gift of the whole estate in fee, there is a subsequent limitation over in the event of the first devisee dying under age and without issue, the gifts are not repugnant to each other and the latter is a valid executory gift.” (*Williams v. Jones*, 166 N. Y. 522.)

Mr. Roxbury having died before the period of distribution arrived, the conditional limitation over took effect and his administratrix acquired no right to the share of the residuary estate bequeathed to him. The right to one-seventh of the residuary estate which had vested upon the death of the testator was divested by the happening of the contingency provided for.

So much of the decree of the surrogate as is appealed from must be reversed, with costs to the appellants payable out of the estate, and the proceeding remitted to the surrogate for action in accordance with the views herein expressed.

O'BRIEN, P. J., INGRAHAM and McLAUGHLIN, JJ., concurred; HOUGHTON, J., dissented.

HOUGHTON, J. (dissenting):

Charles W. Roxbury having survived the testator, I think he had a vested interest in such of the residuary estate as existed at the time of his own death, and that the decree of the surrogate was right and should be affirmed.

The intention of the testator seems quite plain. After the payment from his estate of the specific legacies which he had given, and taking out the provision for his monument, he must be presumed to have realized that a large residuum, consisting of more than half of his estate, would be left. The annuities or annual payments provided were not to be made from income for they were expressly stated by the testator in his codicil to be legacies payable in ten annual installments. It was, therefore, incumbent upon the executors to set apart \$43,500 to meet these annual payments of \$4,350 as they fell due each year for a period of ten years. This sum could not be permanently invested, because it was necessary to pay out one-tenth part of it annually. The testator undoubtedly assumed

that his executors might be able in the prudent management of the estate to realize some income from it. A small rate of interest could be had by depositing it in some trust company or like institution, and it would be their duty so to do. The amount of interest which might be realized from this fund could not be finally determined until the period of ten years had elapsed. Nor could the executors finally account until the end of that time, unless all those whose legacies were payable in ten annual installments should sooner die, which it is not to be presumed the testator contemplated.

The 26th clause begins with the words, "All the rest, residue and remainder of my property," which is quite comprehensive enough to take in all property not otherwise disposed of. But the testator desired to specify particularly that there was *another residue which might accrue after his death*, to wit, the interest which might be received on the \$43,500, and so he uses the words, "and the interest which may be received from the sums set apart to pay the legacies hereinbefore devised," meaning, of course, the legacies which were payable in ten annual installments. This was an artificial residuum as distinguished from the general residue of his estate, and it seems to me that he had this artificial residuum *only* in mind when he provided that in case of the death of any of his named residuary legatees "before the *whole* of my estate shall be divided, then I direct the said residuary to be divided among the survivors only share and share alike."

The words last quoted are those which raise the ambiguity with respect to the residuary clause. By apt and comprehensive words previously used the testator gave all the remainder of his estate to named residuary legatees share and share alike. This absolute gift should not be cut down to one dependent upon survivorship to a time when the estate should be finally settled, unless the language used compels such construction. The ambiguous language can well lay hold of, and apply to, the artificial residuum arising from interest on the fund held to pay the installment legacies, and I think it should be confined to that and not be held to apply to the general residuary estate, thus avoiding repugnancy and the cutting down of the superior estate previously given. Nor is it doing any violence to the language so to do. The words "before the whole of my estate shall be divided" imply that a division of a part, to wit, the



App. Div.]

First Department, March, 1906.

general residuum, had been previously made. The words "the said residuary" may well be said to apply in the mind of the testator to something other than all the "rest, residue and remainder" of his estate, and to apply to the uncertain and comparatively small sum of money which should be accumulated from the moneys held to pay the installment legacies, which amount, insignificant in comparison with the general residue of the estate, he desired should be distributed amongst those residuary legatees who should be living at the time the amount was finally ascertained and the last and final accounting had.

This view is strengthened by reference to the body of the will. The testator had no children, but he did have a wife. He gave her the house and its furnishings and \$5,000 only in money, but no annuity or legacy payable in installments. He was not as liberal with her as he was with his sister Mary, for he gave her \$5,000 and \$1,000 a year for ten years. The testator must have known that estates are liable to be involved in litigation, and that a final accounting by executors and a distribution of funds is uncertain in time and may be long postponed. Strictly speaking, the *whole* of the estate, under the provisions of the will, could not be divided until ten years had elapsed. To my mind it seems to be doing great violence to the apparent intention of the testator to say that he meant that his wife, for whom he had made so meagre a provision, should have nothing during a possibly prolonged administration of the estate, to maintain herself and the home he had devised to her, and no right to any part of his residuary estate unless she survived a final division and distribution by his executors. Manifestly he was also solicitous for the welfare of his sisters and those of his nephews and nieces who were mentioned in his will. He could not have intended that, although they survived him, their right to any part of his estate should be postponed to any such indefinite and possibly distant period as the time when "the whole of my estate shall be divided."

The law favors the vesting of estates; and limitations over, and vesting subject to be divested, and postponing enjoyment of property, will not be imputed to a testator if it can be avoided. It is only where the testator has unequivocally expressed his intention to create these artificial estates that the courts will adjudge them to

exist. It quite frequently happens that authorities are of little aid in construing a will, but it would appear that the principles laid down in *Manice v. Manice* (43 N. Y. 303) and *Shangle v. Hallock* (6 App. Div. 55) were quite applicable to the language found in the will under consideration.

The interpretation put upon the will by the prevailing opinion seems to me at variance not only with the intention of the testator, but with the language which he used, and I, therefore, dissent from a reversal of the decree and vote for its affirmance.

Decree reversed, with costs to appellant payable out of estate, and proceedings remitted to surrogate. Order filed.

---

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JAMES F.  
DOLAN, Appellant.

First Department, March 9, 1906.

**Crime—uttering forged note—knowledge of defendant—evidence—error in excluding communications made to defendant as to general character of note—when error to admit evidence of other unrelated forgeries.**

When upon the trial of an indictment containing two counts, *first*, for forging a note, and, *second*, for uttering said forged note, the first count is withdrawn, the knowledge of the defendant that the note was forged becomes an issue, and it is reversible error to exclude evidence of communications made to the defendant by any person respecting the validity of the note, and whether or not it was made by the drawer or by his authority, or that it was genuine and not forged. Such communications bear directly upon the question as to whether the defendant knew that the note was forged when he uttered it.

The evidence of such communications to defendant should not be restricted to those made to him before or at the time that he uttered the note when he claims to have first learned of the forgery when it was protested for non-payment, and it is error to exclude such communications made after that time.

While evidence of other forgeries so related to the transaction in question as to show a common motive or intent may be admissible on the question of motive or knowledge that said note was forged, it is reversible error to admit evidence of other independent forgeries which are not so related to the forgery in question as to throw light upon the defendant's knowledge thereof.

INGRAHAM and McLAUGHLIN, JJ., dissented, with opinion.

App. Div.]

First Department, March, 1906.

APPEAL by the defendant, James F. Dolan, from a judgment of the Court of General Sessions of the Peace in and for the city and county of New York in favor of the plaintiff, rendered on the 19th day of May, 1904, convicting the defendant of the crime of forgery in the second degree.

*Alfred R. Page*, for the appellant.

*Robert C. Taylor*, for the respondent.

HOUGHTON, J.:

The general facts are fully stated in the opinion of Mr. Justice INGRAHAM and further statement of them is unnecessary.

I think the judgment of conviction should be reversed because of errors committed upon the trial.

The charge that the defendant forged the note in question was withdrawn, and he was tried for the crime of uttering it. This issue, of course, involved his knowledge that the note was forged when he procured its discount at the bank. The only proof that the note was forged was by Cockerill who testified that he did not sign it. Miss Fitzpatrick had general charge of defendant's office and took the note in question to the bank with the money to pay the discount, informing the bank that the defendant would call later and indorse it. The cashier of the bank testified that the defendant called that same day and indorsed this note with others. The defendant says that he was not in the city on that day and produces evidence of other witnesses to corroborate him in that respect, and that he called several days later and made the indorsements. All these circumstances with respect to delivery of the note to the bank and the indorsement of it by the defendant show good reason for the People abandoning the charge of forgery made against the defendant and confining the issue to that of uttering a forged instrument. Whatever was communicated to the defendant by any person with respect to the validity of the note, and as to whether or not it was in fact made by Cockerill, or by his authority, or that it was a valid instrument, or that it was a genuine note and not forged, was of course most pertinent upon the question of defendant's knowledge that it was a forged instrument and upon his intent in uttering it. While the defendant was testifying in his own behalf certain questions were asked him with respect to what he had learned in regard to the

note and its execution when it had become due, and at the time its validity was called in question, and what Miss Fitzpatrick told him in respect to it, and whether or not she told him that she herself had signed "Tho. Cockerill & Son" to the note. The defendant had already testified that he knew nothing of the forgery of the note, or that it had been made by Miss Fitzpatrick or any other person aside from Cockerill at the time it was delivered to the bank, or when he indorsed it, and had no such knowledge until its validity was questioned on its presentation for payment. If he then, for the first time, learned that the note was in fact a forgery, he certainly had a right to prove that fact, for it tended to prove that at the time he uttered the note he had no knowledge that it was forged, and, therefore, no intent to defraud the bank by uttering it. He was not confined to the bare statement that he then learned the fact for the first time, but could prove how that knowledge came to him. It seems to me to be evading the question to say that such evidence would be competent if it related to the time of his indorsement and uttering of the notes, but incompetent because the knowledge was acquired at a subsequent time. The contrary follows, for if he had been informed by Miss Fitzpatrick before he indorsed and uttered the note that she had forged it, then he had knowledge of its forgery, and was proving himself guilty of the crime of which he was charged. The questions propounded, answers to which were excluded by the court, were not as sharp and pointed as they might have been, but I think the testimony sought to be elicited tended to prove that, at the time the irregularity of the note was discovered, the defendant then entered upon an inquiry as to how it came to be made and who forged it. He had a right to show to the jury that then was the time he first learned that the note was forged. If the jury believed his story in this respect, then, of course, he was not guilty of the crime for which he was being tried, because he did not utter the forged paper, knowing at the time he uttered it that it was forged. His knowledge and intent was the only issue to be considered, because the People had abandoned the charge that the note was forged by him. On this issue the defendant had the right to prove any facts pertinent to the questions involved, and which tended to put an innocent aspect upon his own acts. (*Donohue v. People*, 56 N. Y. 208, 213; *People v. Gardner*, 144 id. 119, 131.)

App. Div.]

First Department, March, 1906.

I am also inclined to the opinion that the People were permitted to go too far in proving the forging and uttering of other notes in addition to the series of Cockerill notes. These were notes negotiated, not with the bank which discounted the Cockerill note, but with other banks and individuals, and which were all paid in due course. The most of them, if not all, were subsequent to the discount of the original Cockerill note on the 13th of May, 1897. They, therefore, had no bearing with respect to the financial embarrassment of the defendant, which would induce him to forge or utter the Cockerill note to obtain funds to redeem any other forged paper. It was competent to show that the original Cockerill note was forged, and that it was renewed with forged paper. The other notes, however, were mere bald independent forgeries, if forgeries at all. Besides, proof as to the forgery of many of them was permitted without producing the note itself.

I am aware that the issue of knowledge that an instrument is forged, and intent to defraud in uttering it, is a very broad one, and that many crimes might go unpunished if the People were not permitted to prove that a person charged with a particular crime was engaged in a general scheme to defraud by similar means. In the present case, however, the simple issue was whether the defendant knew that the note dated October 13, 1897, delivered to the bank by another person for his benefit was a forged instrument. It is difficult to see how the fact that the Stuart and Gallagher notes were forgeries would throw any light on that question. The rule with respect to independent crimes is summed up by EARL, J., in *People v. Shulman* (80 N. Y. 373, 376) as follows: "But there is one general rule which must apply to all such cases; there must be in the transactions thus sought to be proved some relation to or connection with the main transaction. That is, they must show a common motive or intent running through all the transactions, or they must be such as in their nature to show guilty knowledge at the time of the main transaction, and if they possess these characteristics then it matters not whether they were before or after, or near to or remote from the main transaction." This is one of the cases cited as authority for the rule laid down in *People v. Everhardt* (104 N. Y. 591). It would seem that the issue involved in the present case was very like the issue in *People v. Weaver*

(177 N. Y. 434). There the single issue raised by the defendant was that there was no intent on her part to defraud and that she acted in good faith and in the honest belief that she had a right to indorse another's name on the instrument which she was indicted for forging and uttering. Testimony that she had forged other instruments was held to have been improperly received. Ordinarily, forgery is proved by showing that the person charged wrote the instrument or the signature. In the *Weaver* case the defendant did not deny writing the name, but did deny that she wrote it without authority or with the intent to deceive or defraud. In the present case the issue was not that the defendant actually forged the instrument, but whether or not he knew it was forged and intended to defraud by uttering it. There was no more reason for saying that proof of other independent forgeries by him threw light upon his knowledge as to whether the note in question was actually forged than there was in the *Weaver* case for saying that other forgeries threw light upon the question as to whether the defendant in good faith believed she had the right to indorse the note with another's name.

The defendant may be guilty of the crime charged, but that is no reason why his trial should not be conducted in accordance with the proper rules of law or why he should be loaded down with a mass of immaterial evidence which could but prejudice him in the minds of the jury.

Other errors are urged, but inasmuch as we deem those considered sufficient to call for a new trial, it is unnecessary to consider them.

For the foregoing reasons I think the judgment of conviction should be reversed and a new trial granted.

O'BRIEN, P. J., and LAUGHLIN, J., concurred; INGRAHAM and McLAUGHLIN, JJ., dissented.

INGRAHAM, J. (dissenting):

The defendant was convicted under the second count of an indictment which charged that he "with intent to defraud, did feloniously utter, dispose of and put off as true" a certain forged note set out in the indictment.

App. Div.]

First Department, March, 1906.

The defendant carried on business as a stonecutter and had an account in the Twelfth Ward Bank in the city of New York. From May to October, 1897, he had a large number of notes discounted by the bank. The defendant having a contract for building a courthouse in Rensselaer county and other contracts, the Twelfth Ward Bank made advances from time to time to enable him to carry on his operations. He had assigned to the bank the money he was to receive for building the courthouse as security for the advances made, the defendant testifying that the course of dealing between himself and the bank was that he would take his own notes to the bank and leave them with it as security for advances; that the defendant made his notes payable to the order of himself, and the bank advanced to him money for his payrolls, the defendant receiving back the notes when the bank received payments under the Rensselaer courthouse contract; that he also gave to the bank notes of other people payable to his order. The cashier of the Twelfth Ward Bank testified that the first time he saw the forged note in question was on October 13, 1897, when the defendant indorsed it in his presence; that this note was dated October 13, 1897, purported to be made by Thomas Cockerill & Son, payable to the order of the defendant in thirty days at the West Side Bank, and was indorsed by the defendant. It appeared that on May thirteenth or fourteenth of the same year the defendant presented to the bank a note which purported to be signed by Thomas Cockerill & Son for \$2,500; that the defendant then said that he was doing work for Mr. Cockerill and that he would like to get the money on the note then presented; that the note was discounted for the defendant and became due on August 13, 1897; that on that day the defendant came to the bank, brought with him a note for \$2,000, dated August 13, 1897, payable two months after date, and which purported to have been made by the same firm, and \$521 in cash; that \$500 was paid on account of the note for \$2,500; the note for \$2,000 was discounted, the \$21 paying the discount; that on October 13, 1897, a Miss Fitzpatrick, an employee of the defendant, brought the note in question to the bank; there was attached to it a ten-dollar bill for the discount; that she presented it to the bank and said that the defendant could call later in the day and indorse it, and that the defendant called later on the same day and

said to the cashier that a note had been brought there by Miss Fitzpatrick for him to indorse, and the witness gave the defendant the note, who then indorsed it, and the note was discounted for the defendant, the proceeds being applied to the note of August thirteenth.

It being conceded that the note in question was forged, the question presented is whether the defendant uttered it, knowing that it had been forged. There was no evidence in the case to show who actually forged the note in question. I think the evidence was amply sufficient to justify a conviction under the indictment. The defendant, however, claims that it was error to admit in evidence transactions relating to two notes purporting to have been made by James Stewart & Co., one indorsed by the defendant, and which he induced Isaac A. Hopper to have discounted for him, and the other purporting to be made by the same makers, upon which he obtained a loan from Mr. John Hopper. This testimony, in substance, was that on the 29th day of July, 1897, the defendant called upon Isaac Hopper and asked him if he could get a note discounted; that he then produced a note of James Stewart & Co. for \$3,200 at ninety days; that this note was made to the order of the defendant; that the defendant indorsed it and delivered it to Hopper, who took it to the Twenty-third Ward Bank, indorsed it and procured its discount by that bank, and turned the proceeds over to the defendant; that on August 9, 1897, the defendant came to John Hopper, a brother of Isaac A. Hopper, with a note for \$3,200 purporting to be signed by James Stewart & Co. This note was dated July 27, 1897, and was payable to the order of the defendant three months after date. The defendant asked John Hopper to make him a loan upon that note, whereupon Hopper gave him \$2,800, the note of Stewart & Co. being left with Hopper as security. There was then testimony that the note for \$3,200 which Isaac A. Hopper had procured the Twenty-third Ward Bank to discount had been sent to Buffalo for collection, when notice had been given to the bank that there was some irregularity with the signature, but that on October 23, 1897, the note was paid in New York to the Twenty-third Ward Bank, and that bank then ordered the note returned from Buffalo. What subsequently became of the note does not appear. When the note for \$3,200 given to John Hopper on



App. Div.]

First Department, March, 1906.

August ninth came due, the defendant went to John Hopper, gave him a check for the amount that Hopper had loaned, and received back the Stewart note. On the following morning (October nineteenth) the defendant again saw John Hopper and told him that the check was not good; that the note was a forgery and that there was no use in presenting the check, as the defendant had not the money to meet it. At that time the defendant said that if Hopper told anybody about the note being a forgery, his family would be disgraced and he felt like jumping off the dock. He (defendant) said that he had to do it; that he was in close quarters and needed the money very bad; that he had a note for \$3,200 that Mr. Isaac A. Hopper had indorsed and had discounted at the Twenty-third Ward Bank, whereupon Hopper gave him a check for \$3,200 to meet the note in the bank, the discount of which had been procured by Isaac A. Hopper. This evidence was all objected to by the defendant, the objection was overruled, and the defendant excepted.

In considering the admissibility of this evidence, we must keep in mind that the question for the jury to determine was whether, when the defendant presented this note for discount at the Twelfth Ward Bank he knew that it was forged. That his employee presented the note for discount, that he indorsed it, that it was discounted by the bank for him, that he received the proceeds and that the note was forged, is all conceded. Irrespective of this evidence as to the Stewart notes, the evidence was amply sufficient to justify the jury in finding that the defendant knew the note in question was forged. This was the third note of the same makers that had been discounted by the defendant at this bank which was forged. The first forged note was presented by the defendant for discount on May 13 or 14, 1897, and was for \$2,500. When that note came due the defendant took a note for \$2,000 to the bank purporting to have been made by the same makers, which was also forged, and obtained its discount, the proceeds being applied to take up the first forged note. When the second forged note came due, the defendant presented another forged note of the same maker, which is the note in question, procured its discount and with it took up the second forged note. Assuming that it may have been possible that the defendant had been deceived as to one note, as there is no claim that either of these notes was obtained from the makers and that the forgery

must have been committed by somebody connected with the defendant and solely for his benefit, it is improbable that all three notes could have been forged, discounted by the bank for the defendant, and provision made for their payment without presenting them to the makers, without a knowledge of the defendant as to their character. That he had extended his operations so as to procure the discount of notes of other persons which were forged, and his admission to those whom he had defrauded of the forgery of the notes, was undoubtedly important evidence in the minds of the jury of his guilty knowledge as to the note in question.

The rule that upon the trial of an indictment charging a specific crime evidence of other crimes is not admissible, has been recognized as one of the most beneficent rules of the common law preventing the conviction of a defendant because of his bad character or because he had been guilty of crimes other than the crime for which he was being tried; but it has always been recognized that the mere fact that evidence would tend to prove the commission of another crime does not make it incompetent if it bears directly upon the guilt of the defendant of the crime for which he is being tried. The question always is whether the facts sought to be proved bear upon the guilt or innocence of the defendant of the crime for which he is being tried. This question is discussed in *People v. Molineux* (168 N. Y. 264). In that case the defendant was convicted of killing one Katharine J. Adams, and the question presented to the court was whether an attempt to kill one Barnet by the same means which were employed in the death of Mrs. Adams was competent for the purpose of proving his guilt of the crime of killing Mrs. Adams as charged in the indictment. The court recognizes the rule that it is not permitted to show the defendant's former character, or to prove his guilt of other crimes merely for the purpose of raising a presumption that he who would commit them would be more apt to commit the crime in question. The exceptions to this rule are then referred to, the court saying: "The exceptions to the rule cannot be stated with categorical precision. Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other

App. Div.]

First Department, March, 1906.

that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial." This does not purport to be a complete statement of cases in which evidence of a crime other than that charged in the indictment is competent, but it seems to me it would be more correct to say that evidence of a crime other than that charged in the indictment is never competent where it is offered solely to establish the bad character of the defendant or the commission of other crime. The evidence is competent when it tends to convict the defendant of the crime for which he is being tried. If it is competent upon that issue then the mere fact that it tends to show that the defendant is guilty of another crime does not make it incompetent. If not competent evidence as fairly tending to convict the defendant of the crime charged in the indictment, it is not competent.

In *People v. Everhardt* (104 N. Y. 591) the competency of such evidence when the question is of the defendant's knowledge of the character of the forged instrument which he was charged with uttering was directly passed upon. Judge EARL, in delivering the opinion of the court in that case, said: "Upon the trial, the people were allowed to prove against the objection of the defendant, the uttering of other forged checks by him upon other occasions. In this there was no error. The defendant by his plea of not guilty had put in issue everything which it was incumbent upon the people to prove. They had no direct or positive evidence that he personally forged the check which he uttered, and it was open for him to show that at the time he uttered it he had no knowledge that it was forged, and was therefore innocent of crime; and for the purpose of showing the prisoner's guilty knowledge in such cases it has always been held competent to prove other forgeries. \* \* \* Such proof is not received for the purpose of showing other crimes than that charged in the indictment, but for the purpose of showing the guilty knowledge and intent which are elements of the crime charged, and it can be considered by the jury only for that purpose. Although the evidence of Gaylord, corroborated as it was, as to the guilty knowledge of the defendant, was quite clear and convincing, yet the people were not bound to rest upon a *prima facie* case, but had the right to confirm that evidence by the proof as to the utter-

ing of other forged checks." In that case, as in the case now before us, the evidence was introduced to show knowledge of the defendant that the note that he procured to be discounted was forged; it seems to me to be controlling authority that evidence that at about the same time the defendant had uttered other forged instruments of the same character was competent evidence upon the question of guilty knowledge.

The defendant, however, claims that this case has been overruled by the case of *People v. Weaver* (177 N. Y. 434). The facts of that case are discussed in the opinion of Judge O'BRIEN, but his opinion was not adopted by the court, the majority of the court stating: "As the facts in this case are sufficiently narrated in the opinions of Judges O'BRIEN and WERNER, we think it necessary simply to state the various questions presented by this appeal and our determination of the same without comment or discussion;" and it was then held that it was error to allow a witness to refer to the other notes alleged to be forged but which did not purport to be indorsed by Davis. The issue in that case, however, was different from that presented in the case at bar, for in that case the defendant admitted forging the note and having it discounted, but alleged that she understood that she had authority from Davis whose indorsement she forged. As to whether or not she actually had such authority, or whether she honestly and in good faith believed she had, was an entirely different question from that presented here, namely, whether a note concededly forged was presented to the bank without knowledge of the fact that it was forged. Whether the defendant in the *Weaver* case had or had not forged other notes was not material upon the question as to whether she actually had or supposed that she had authority to sign Davis' name as indorser of the note; but this case comes within the principle established in the *Everhardt* case, where the question of guilty knowledge was presented, and I think that evidence that the defendant, about the same time that he uttered the forged note, for the utterance of which he is being tried, presented and procured the discount of other forged instruments which he admitted he knew were forged when he procured their discount, was competent. In Judge O'BRIEN's opinion in the *Weaver* case the distinction is taken, for there he says: "It is clear that upon the single issue raised by the

App. Div.]

First Department, March, 1906.

defendant, namely, that there was no intent on her part to defraud, that she acted in good faith and in the honest belief that she had a right to do what she did, this testimony as to the other indorsements must have greatly embarrassed the defendant upon the trial of the only issue in the case, and must have tended to prejudice and mislead the jury." In the dissenting opinion of Judge WERNER, after citing the *Everhardt* case, he says: "Intent is a state of mind, and that is a thing not provable by direct evidence. This is the reason for the rule that in all cases where the *scienter* or *quo animo* is requisite to and constitutes a necessary and essential part of the crime with which a person is charged, and proof of guilty knowledge is indispensable to establish his guilt in regard to the transaction in question, testimony of such acts, conduct or declarations of the accused as tend to establish such knowledge or intent is competent, notwithstanding they may constitute in law a distinct crime," and from this statement of the rule, as I understand it, there was no dissent. I do not think, therefore, that it was error to admit the transactions in relation to the Stewart notes.

There is also another question relied upon by the defendant which related to the exclusion of his testimony in relation to the Cockerill notes. The defendant was called as a witness on his own behalf. He stated that he was not in New York on the thirteenth day of October, the day on which it was alleged he indorsed the note in question; that he was in Troy on October eleventh, stayed in Troy until Wednesday, thirteenth, and on that day went to his quarry and stayed there until the fifteenth, when he left for Boston, and arrived in New York late Saturday evening, October sixteenth; that the following Monday he went to the bank and indorsed three notes which had been left at the bank for discount to be indorsed by him when he returned, and among these three notes was the Cockerill note in question; that he first knew that the note was not what it purported to be on November thirteenth, when it became due; that he knew nothing about the \$2,500 note purporting to be made by Cockerill and which was discounted on May thirteenth; that he had no recollection of going to the bank on the thirteenth of August and no recollection of the note for \$2,000 which was discounted by the bank on that day. Upon cross-examination he stated that he would neither deny nor affirm that he indorsed the

Cockerill note for \$2,500, but he simply had no recollection of indorsing or discounting it; that when he indorsed the Cockerill note on October eighteenth he thought that his office had received that note as a collection and that it had been placed in the bank for discount — that some one in his employ had collected the note as a payment on account of money due from Cockerill to him and had left it at the bank to be discounted. Upon redirect examination he was asked whether the note in question which he was accused of having uttered was taken to the bank by his direction, and he said: "The note was taken to the bank by my direction." Subsequently he corrected that and said that he did not know anything about the Cockerill note being taken to the bank; that October eighteenth was the first time he knew the note was there; that on November thirteenth, when the note became due, he was informed by the president of the bank that there was an informality about it and he returned to his office and had a conversation with Miss Fitzpatrick. He was then asked about his interview with Miss Fitzpatrick, with the president of the bank, and with Mr. Cockerill. These questions were objected to and excluded, but this evidence was all incompetent. It would have been quite competent to prove that at the time he indorsed the note in question, or prior thereto, he had any conversation with Miss Fitzpatrick, or the defendant, or any one, as to the character of notes to show what knowledge he had at the time about the notes when they were discounted, but conversations with these people a month afterwards, when the note came due, had no relation to his knowledge on the thirteenth day of October, when it was shown by the People's testimony that he had indorsed the note. He was allowed to testify as to his relations to this note and the other notes of Cockerill that were discounted for him by the Twelfth Ward Bank. He had testified that he had no knowledge of either of the Cockerill notes discounted prior to the one in question, and had no knowledge of this note until October eighteenth, when he indorsed it, and then supposed it was a collection from Cockerill given in payment of money that was due to him. He also testified that when he had this interview with Miss Fitzpatrick, after November thirteenth, when this note was due, it was the first knowledge or information that he had that this note was a forgery.

App. Div.]

First Department, March, 1906.

There were many other objections and exceptions taken by the defendant to rulings upon questions of evidence, but none of them require consideration; and my conclusion is that the evidence was amply sufficient to justify the verdict of the jury, and that no error was committed which would require us to reverse the judgment.

The judgment appealed from should be affirmed.

McLAUGHLIN, J., concurred.

Judgment reversed, new trial ordered. Order filed.

---

FREDERICK LANGE and Others, as Executors, etc., of HENRY J. SCHILE, Deceased, Respondents, v. ROMEO H. SCHILE, Appellant.

First Department, March 9, 1906.

**Taxation of costs — costs before notice of trial in action for money had and received — when complaint states such cause of action.**

In an action in tort the costs before notice of trial should be taxed at twenty-five dollars, but if the action be *ex contractu* said costs should be taxed at fifteen dollars.

When the allegations of a complaint make it doubtful whether an action is in tort for money received in a fiduciary capacity and converted, or merely for money had and received, it should be construed as an action *ex contractu* and the costs before notice of trial taxed at fifteen dollars.

The mere allegation that the defendant, who had received moneys from the plaintiff to pay out on certain claims, "converted the same to his own use," does not characterize the cause of action but may be regarded as surplusage.

Ambiguous complaint construed.

APPEAL by the defendant, Romeo H. Schile, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 22d day of January, 1906, dismissing the defendant's appeal from the taxation of costs by the clerk and affirming the said taxation.

*Edward W. S. Johnston*, for the appellant.

*George M. S. Schulz*, for the respondents.

PATTERSON, J. :

The court at Special Term denied a motion made by the defendant for a retaxation of costs and affirmed the taxation of such costs by the clerk of the city and county of New York, who allowed the plaintiff the amount of twenty-five dollars as costs before notice of trial. The defendant insists that such costs should have been taxed at fifteen dollars. Whether the one or the other amount should be allowed depends upon the nature of the action, namely, whether it is upon contract or in tort. (Code Civ. Proc. §§ 420, 3251, subd. 1.) In support of the order it is insisted by the respondent that the averments of the complaint set forth a cause of action for the conversion of money belonging to the plaintiffs' testator. The allegations of that pleading are that Henry J. Schile (plaintiffs' testator) in June, 1900, gave into the possession of the defendant moneys amounting to the sum of \$4,317.74, "the defendant agreeing to deposit the same in a trust company and to apply the same to the payment of certain claims and liens which had been filed against real property owned by the said Henry J. Schile, in the City of New York, and which were then being litigated, in the event of said litigation terminating prior to the return of the said Henry J. Schile to the City of New York; and if the said litigation had not then terminated, or if it had terminated and the defendant had not paid over the said moneys, then to return the said amount with such interest as had accrued thereon to the said Henry J. Schile upon his return as aforesaid." The plaintiff then proceeds to state in the complaint that on the 1st of September, 1900, Schile returned to the city of New York; that the defendant at that time had possession of the money and that Schile then requested the defendant to pay claims owing by him (Henry J. Schile); that such payments were made so as to reduce the sum in the defendant's hands to \$3,012.62. After setting forth the death of Henry J. Schile and the appointment of the plaintiffs as executors, the complaint contains the allegation that the plaintiffs made a demand for the return of the amount remaining in the defendant's hands, but that the said defendant wrongfully and unlawfully refused to turn over and pay to the plaintiffs the said amount and converted the same to his own use, to the damage of the plaintiffs, as executors, as aforesaid, in the sum of \$3,012.62, wherefore the plaintiffs demanded judgment for that sum of money with interest.



App. Div.]

First Department, March, 1906.

The contention of the respondents is that this complaint charges that the defendant acting in a fiduciary capacity, charged with a specific duty concerning the moneys in his hands, violated his trust and converted those moneys to his own use. It is quite apparent from the allegations of the complaint that if a particular duty devolved upon the defendant in the first instance of paying claims which might be established during plaintiffs' testator's absence, or of restoring to him the money on his return from Europe, that relation to the matter was changed when Henry J. Schile did return, for under his direction and at his request some of the money was withdrawn and paid to his creditors, and the balance remained in the defendant's hands. That situation would indicate that the defendant merely neglected to pay over a balance of moneys remaining in his hands belonging to the plaintiffs' testator, and the addition in the complaint of the words that the defendant "converted the same to his own use," does not characterize the cause of action, but is to be regarded as surplusage. (*Segelken v. Meyer*, 94 N. Y. 484, and cases there cited.) The cause of action is for money received. It is not to be assumed that by the insertion of the words quoted in the complaint the pleader has declared in tort. At all events, if the cause of action set forth is doubtful or ambiguous, every intendment is in favor of construing it as being an action *ex contractu*. (*Goodwin v. Griffis*, 88 N. Y. 629. See, also, *Foote v. Ffoulke*, 55 App. Div. 617; *Cohn v. Beckhardt*, 63 Hun, 333; *Reed v. Hayward*, 82 App. Div. 417; *Town of Green Island v. Williams*, 79 id. 263.)

On the trial of this cause the statement that the defendant converted the money to his own use could have been disregarded and a recovery had on the other allegations of the complaint, as in an action for money had and received. (*Town of Green Island v. Williams*, 79 App. Div. 263.) On such a complaint an execution against the person could not issue. In an action of tort the plaintiff cannot recover unless the tort be actually proven, but under this complaint a recovery could be had upon the other allegations contained therein. In *Britton v. Ferrin* (171 N. Y. 235) the complaint was exclusively in tort; and in *Moffatt v. Fulton* (132 id. 507) the allegations of the complaint were also held to constitute an action in tort. We are, therefore, of the opinion that the order

appealed from should be reversed, and the costs before notice of trial should be taxed at fifteen dollars.

Order reversed, with ten dollars costs and disbursements, and the item of costs in question allowed at fifteen dollars.

O'BRIEN, P. J., INGRAHAM, LAUGHLIN and CLARKE, JJ., concurred.

Order reversed, with ten dollars costs and disbursements. Order filed.

---

JULIA L. DWIGHT, Respondent, v. EDGAR V. LAWRENCE, Individually and as Sole Heir at Law of SAMUEL R. LAWRENCE, Deceased, Appellant, Impleaded with KATHERINE L. NEUMANN and Others, Defendants.

First Department, March 9, 1906.

**Partition — when direction for sale of premises proper although there are contingent interests.**

Although there are contingent interests in real estate devised by will dependent upon whether children entitled to share may come into being, an order of sale in an action for partition is proper, when all the persons who have a present interest in the subject-matter of the sale are before the court, including the executor of the will who will receive the portions of such afterborn children in trust to be disposed of under the terms of the will.

APPEAL by the defendant, Edgar V. Lawrence, individually and as sole heir at law of Samuel R. Lawrence, deceased, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 18th day of April, 1905, upon the report of a referee, directing a partition and sale of certain real property.

*Charles L. Hoffman*, for the appellant.

*De Lagnel Berier*, for the respondent.

*W. H. Van Steenberg*, guardian *ad litem* of the infant defendant Katherine R. Neumann.

PER CURIAM:

The judgment appealed from must be affirmed. It properly directs a sale of the property affected. It is perfectly obvious, under the proofs presented, that an actual partition could not be

App. Div.]

First Department, March, 1906.

made so as to do justice to all of the parties interested. Under the judgment appealed from the plaintiff is entitled to an undivided one-fourth interest; the appellant, individually and as sole heir at law of Samuel R. Lawrence (who has died since the appeal was taken), is entitled to an undivided one-half interest; and the remaining one-fourth interest is held by Gaines Lawson, as executor and trustee under the last will and testament of Laura Lawson, deceased, in trust to pay the income therefrom, one-half to the defendant Katherine L. Neumann during her life and the other half to Lawrence M. Lawson during his life. The defendants Katherine L. Neumann, Lawrence M. Lawson and the infant defendant Katherine R. Neumann have an interest, either vested or contingent, in this remainder, but it is immaterial whether or not such interest be correctly stated in the judgment, inasmuch as none of them have appealed therefrom and this part of the judgment in no way affects or concerns the plaintiff. It is sufficient to say that a purchaser upon the sale will obtain good title inasmuch as there are now before the court all of the parties who at the present time have any interest in the subject-matter of the sale. (Code Civ. Proc. §§ 1557, 1577.) The fact that there may hereafter be unborn children who might have an interest in the one-fourth interest or some part thereof now held by Gaines Lawson, as executor and trustee, could not affect the title because "the person(s) first entitled to which or other virtual representative(s) whereof" are parties to the action. (Code Civ. Proc. § 1557, subd. 3.) The only appellant is Edgar V. Lawrence.

The plaintiff, after deducting the costs and expenses of the sale, will be entitled to one-fourth of the proceeds, the appellant to one-half, and the defendant Gaines Lawson, as executor and trustee under the last will and testament of Laura Lawson, to the remaining one-fourth, the same to be held by him in trust and to be disposed of in accordance with the terms of such will.

The judgment appealed from, therefore, should be affirmed, with costs to the respondent.

Present — O'BRIEN, P. J., INGRAHAM, McLAUGHLIN, LAUGHLIN and HOUGHTON, JJ.

Judgment affirmed, with costs. Order filed.

LEONARD J. HEALY, an Infant, by THOMAS H. DOWD, as Guardian ad Litem, Respondent, v. BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY, Appellant.

Fourth Department, March 7, 1906.

**Negligence—injury to eye of fireman by explosion of water gauge—failure to show negligence of defendant.**

The plaintiff, a fireman, was struck in the eye by a splinter of glass thrown by the explosion of the water gauge of a switch engine on which he was working. Two items of negligence were charged, *first*, that the engine should have been equipped with a better and safer water-gauge guard, and, *second*, that the gauge had not been properly inspected.

*Held*, that as the proof conclusively showed that the kind of gauge guard used was adopted by practically all the railroad corporations in the country, the defendant was not chargeable with negligence in its use, although there were other styles of guard in use claimed to be safer. A master is not required to use the best appliances known, but only such as are reasonably safe, and in selecting the kind used he may rely on the judgment of others engaged in the same business.

*Held*, further, that, although there was evidence tending to show that a portion of the glass gauge which broke was worn thin, and that there were certain hair lines thereon that an inspection would have disclosed, it was the duty of the engineer—plaintiff's fellow-servant—to make such inspection or to report the defect to the defendant, which, in the absence of notice, was not liable. An official inspector is not required to inspect each minor detail of an engine each time it is used.

APPEAL by the defendant, the Buffalo, Rochester and Pittsburgh Railway Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Cattaraugus on the 13th day of May, 1905, upon the verdict of a jury for \$2,500, and also from an order entered in said clerk's office on the 16th day of May, 1905, denying the defendant's motion for a new trial made upon the minutes.

The action was commenced on the 17th day of January, 1905, to recover damages for injuries sustained by the plaintiff, alleged to have been caused solely through the negligence of the defendant.

*James S. Havens*, for the appellant.

*Thomas H. Dowd*, for the respondent.

McLENNAN, P. J. :

About eight o'clock P. M. on the 18th day of September, 1904, while the plaintiff was employed as fireman on one of defendant's switch engines being operated in its yard at East Salamanca, N. Y., the water glass attached to such engine exploded in such manner that a piece of the broken glass was forced through the water-gauge guard, struck the plaintiff in the eye and caused the loss of its sight. To recover the damages resulting from such injury this action is brought.

At the time of the accident the plaintiff was twenty years of age, had been in defendant's employ continuously for about three years. First, for about a year, he was engaged in coaling engines at Ashford, N. Y., a junction point on defendant's road. After that, for about two years, he was employed as fireman upon engines running regularly between that point and Rochester, N. Y., or Gainesville, Penn. He then went to Salamanca to take the position of "hostler," and that was his regular employment at the time of the accident and for about three weeks previous. "The duty of a hostler is to take an engine when it is brought in out of service and keep it until it goes out again; get it ready to run on the road. After the hostler takes charge it is run over the pit, and then there is the engine inspector that inspects every engine that goes over the pit thoroughly."

After going to Salamanca, when the plaintiff did not have work to do as hostler, he acted as fireman upon the yard engines, as occasion required, and was so employed on engine No. 156 when he received the injuries complained of. Within a few minutes after assuming the duties of fireman on such engine, while looking at the water gauge, as it was his duty to do, the explosion occurred with the result above stated.

The evidence indicates that the plaintiff was a bright, active, intelligent young man, fully understood the duties of a fireman, and at least, in a general way, was familiar with the methods adopted by the defendant for the conduct of its business in the yard in question.

It is urged on behalf of the respondent that the evidence tends to establish that the defendant was guilty of negligence upon two grounds, and so as to justify the verdict rendered by the jury.

*First*, because it had not equipped the engine in question with a safer or better style or pattern of water-gauge guard, and, *second*, because it failed to properly inspect the water glass which exploded, it being claimed that a reasonable inspection would have disclosed that it was so defective as to render its use unsafe. Practically those were the only questions involving the defendant's negligence submitted to the jury, and it is not claimed that any other could be predicated upon the evidence.

The jury must have determined one or both of such propositions favorably to the plaintiff; therefore, their verdict. If the evidence did not warrant such conclusion as to both, the judgment and order appealed from must be reversed.

The evidence conclusively establishes that the kind or pattern of water-gauge guard which inclosed the tube or water glass which exploded was in general use; had been adopted by practically all the railroad corporations in the country. It was the kind used by the New York Central Railroad Company and other equally important and well-known railroad corporations. The Baldwin Locomotive Works, which manufactures practically fifty per cent of the locomotive engines used in the United States, equips its engines with the same style or pattern of water-gauge guard.

The evidence, however, tended to show that there were other kinds of water-gauge guards also extensively used, which were safer, and that the defendant had about one-half of its engines equipped with such other alleged safer guards.

It is the settled law in this State that an employer does not owe to his employee the legal duty of furnishing the best-known appliances in the conduct of his business in order to protect such employee against injury. He is only required to furnish such as are reasonably safe, and in selecting one of several appliances devised for doing a particular work, and in determining which is the safer, he may rely upon the judgment of others engaged in the same business, and if the appliance selected by him is in general use and has been generally adopted, he is not liable to an employee who may be injured because of the use of the appliance so selected, notwithstanding it may appear that another kind or pattern of such appliance, also in use, was safer and less liable to injure an employee operating or in charge of the same. (*Stringham v. Hilton*, 111

N. Y. 188; *Sisco v. L. & H. R. R. Co.*, 145 id. 296; *Coppins v. N. Y. C. & H. R. R. Co.*, 43 Hun, 26; *Frace v. N. Y., L. E. & W. R. R. Co.*, 143 N. Y. 182; *Flinn v. N. Y. C. & H. R. R. Co.*, 142 id. 11; *Harley v. B. C. M. Co.*, Id. 31; *Leary v. Lehigh Valley R. R. Co.*, 76 Hun, 575.)

In view of the evidence bearing upon this proposition and considering the authorities referred to, it must be held as matter of law that the defendant was not guilty of actionable negligence because the engine upon which the plaintiff was employed as fireman was equipped with the water-gauge guard in question. As we have seen, it was such a guard as was in general use and had been adopted by practically all great railroad corporations of the country as well as by the largest manufacturer of locomotive engines, and, therefore, we think the defendant was not chargeable with negligence for having used such appliance, notwithstanding there were others which in the opinion of experts were safer and the use of which was less liable to result in injury to an employee.

While the conclusion thus reached must result in a reversal of the judgment, because the verdict of the jury may have been based solely upon such alleged ground of negligence, we deem it proper to consider the other proposition imputing negligence to the defendant, which was submitted to the jury by the learned trial court.

A water gauge such as is used upon a locomotive engine is so familiar to all it hardly need be described. It is located in the cab of the engine where it can readily be seen by the engineer and fireman. Its purpose is to inform them at a glance of the amount of water there is in the boiler, and is, therefore, almost constantly observed by one or both of them. It consists of a small glass tube, connected with the boiler in such manner that the amount of water in the boiler is indicated in the tube, and so that steam may be forced through it for the purpose of removing any discoloration or sediment on the inside which would tend to prevent the water line from being distinctly seen, or would prevent the water from readily flowing into it. The glass tube which exploded had been put in place about two weeks before the accident. It was then new and of the very best quality made. The uncontradicted evidence tends to show that such tubes, although perfect, very often break when

first used and without any known cause; others with the same use will last for many months; that their life is practically as uncertain as that of a lamp chimney; that although apparently perfect, they may break almost instantly when first used, while others whose apparent condition is not as good may last for a long time. There is some evidence tending to show that from an examination of small pieces of the tube in question it was discovered that it had been worn thin upon one side and that there were certain hair lines which would have disclosed, if proper inspection had been made, that such tube was practically worn out and that its longer use would be unsafe. We think upon the evidence it cannot be said that the defendant owed the duty to the plaintiff of having such water glass inspected in such manner as to have disclosed its defects, if they existed, by any person other than the engineer, and if such failure to inspect was the neglect of the engineer clearly the plaintiff cannot recover because they sustained to each other the relation of coemployees.

It would be unreasonable to hold that every time an engine was run over the ashpit the engine inspector was required to examine and see that every part of the engine was in perfect repair; to see to it that the handle of the lever just released by the engineer was not cracked; that some valve or stopcock immediately under his control was not loose, or that some other defect within his immediate observation did not exist. If such an inspection was required it is clear that it would have occupied days instead of minutes, the length of time such engines usually stood over the pit. Nor is there force in the suggestion that such engine should have been sent to the repair shop for such an examination or for repairs when there was nothing to indicate to the company that the same was needed. No defect had been reported by the engineer and, therefore, there was no reason to suspect that an appliance which was constantly under his observation was defective, when by the rules of the company it was made his duty to report any defect discovered by him. We think the duty of the engineer upon the engine in question is concisely stated in the head note in *Manning v. Genesee River Steamboat Co.* (66 App. Div. 314), recently decided by this court: "Where a water gauge attached to a steamboat boiler is fitted with a glass which is liable to break at any time and the operation of



replacing the broken glass can be readily performed by turning off the valves at either end of the gauge and thus shutting off the water and then taking out the defective glass and putting in a new one from a supply kept on hand, the duty of replacing the defective glass is incumbent upon the engineer in his character as a servant."

In the case at bar, while there is evidence tending to show that it was not the duty of the engineer operating a switch engine in the yard to remove a defective water glass, it is established beyond dispute that it was his duty to report any defect in such appliance which he discovered. No defect in the water glass in question was reported by him, and we think actionable negligence cannot be predicated upon the fact that the defendant failed to discover such defect in the absence of a report or information by the engineer to that effect.

We conclude that the evidence wholly failed to establish that the defendant was guilty of actionable negligence because it failed to make any other inspection than it did in order to discover the defect in the water glass which exploded, even if a discoverable defect existed.

It follows that the judgment and order appealed from should be reversed and a new trial ordered, with costs to appellant to abide event, upon questions of law only, the facts having been examined and no error found therein.

SPRING, WILLIAMS and NASH, JJ., concurred; HISCOCK, J., not voting, he having ceased to be a member of the court since the argument of the appeal herein.

Judgment and order reversed and new trial ordered, with costs to the appellant to abide the event, upon questions of law only, the facts having been examined and no error found therein.

PATRICK CUNNINGHAM, Respondent, v. JOHN SHEA and SQUIRE L. CRYSLER, Appellants.

Fourth Department, March 7, 1906.

**False imprisonment — evidence — error in excluding rules of institution which permitted imprisonment of plaintiff — evidence that defendants reported their act to the head of institution — error in excluding instructions given to defendants — delegation of power to confine inmates of institution.**

In an action for false imprisonment it was shown that the plaintiff, an inmate of a county house, was using obscene and profane language in the engine room of the institution, and threatening with a knife the defendants, who were employed as engineers. They thereupon placed him in a room designed for the confinement of refractory inmates. On appeal from a judgment for the plaintiff,

*Held*, that the exclusion of the rules of the institution providing that punishment should be inflicted on inmates guilty of "disorderly conduct, profane or obscene language," etc., was reversible error, as under the circumstances said rules were in justification of the act of the defendants.

Inmates of such institutions are amenable to its rules and confinement for unruly conduct is not false imprisonment.

So, too, it is error to exclude evidence that the defendants had reported their act to the keeper and were by him directed to keep the plaintiff in the cell, for the imprisonment was then the act of the keeper, while the damages claimed in the action were not limited to the act of placing the plaintiff in the cell, but for keeping him there an entire day.

It is error to exclude evidence of instructions given by the keeper to the defendants relative to the care of inmates and enforcement of the rules, for such evidence tends to show that the defendants were acting according to directions and were charged with the duty of looking after inmates. Such evidence should not be excluded because the plaintiff waives his claim to punitive damages, as the evidence would explain the action of the defendants.

*Held*, further, that in such institutions power to enforce its rules may be delegated to subordinates.

McLENNAN, P. J., dissented, with opinion.

APPEAL by the defendants, John Shea and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Onondaga on the 24th day of March, 1905, upon the verdict of a jury, and also from an order entered in said clerk's office on the 29th day of March, 1905, denying the defendants' motion for a new trial made upon the minutes.

App. Div.]

Fourth Department, March, 1906.

*Ernest I. Edgcomb*, for the appellants.*Frank C. Sargent*, for the respondent.

SPRING, J.:

The plaintiff was an inmate of the county house of Onondaga county. The defendants were engineers regularly employed therein. The plaintiff, according to the testimony on behalf of the defendants, was using profane and obscene language in the engine room on the premises, and threatened to run a knife into the defendant Shea. The defendants thereupon placed the plaintiff in a room designed for the confinement of refractory inmates, where he was detained during the day.

The action is for false imprisonment and the defendants justified their apprehension of the plaintiff by alleging that at the time they confined him he was violating the rules and regulations of the institution designed for the government of the inmates and was causing a disturbance.

Upon the trial the court several times stated and charged the jury that the transaction was merely a personal altercation between the defendants and the plaintiff, and the facts that he was an occupant of the county house and that the defendants while employed therein confined him for a violation of the rules mentioned and for improper conduct, were not to be considered by the jury. The rules referred to were offered in evidence. It was conceded that they had been properly published and proven, but they were excluded on the ground that they afforded no justification for the confinement of the plaintiff in this room.

We think the exclusion of this evidence was reversible error. Section 10 of the rules, which are contained in the case, provides: "Punishment will be inflicted on all those who are guilty of drunkenness, disorderly conduct, profane or obscene language, theft, waste of food, or any other waste whatever." In the succeeding section the keeper is directed to "promptly inflict the most exemplary punishment" for a "wilful violation" of the rules.

The imposition of severe punishment is intrusted to the keeper. We apprehend, however, that if one of the inmates is swearing boisterously, or attempting to jab one of the other lodgers with a

knife, an employee may take him into custody and place him in the room intended for unruly inmates and report the occurrence to the keeper, who then assumes responsibility and determines what shall be done.

This confinement is not an imprisonment. The inmate all the time is in the custody of those in charge of the county house, amenable to its rules and regulations, and the temporary deprivation of his liberty in the manner stated may be essential to the preservation of order and to the maintenance of discipline.

This confinement of the plaintiff does not involve any question of the delegation or transmission of authority from the superintendent or keeper to the defendants. They took the plaintiff into custody for the purpose of preventing him from doing bodily harm and to check him in the open, flagrant violation of the rules of the institution and from committing violence, and their intervention at the time of the transgression was followed by a prompt report of the transaction to the keeper who had seen them taking him to the cell or room for confinement.

The defendants endeavored to show what they reported to the keeper and that the keeper then directed them to keep the plaintiff in the cell. This evidence was also excluded and its exclusion was material error. The keeper upon being informed of the confinement of the plaintiff in the cell assumed to decide as to his continued custody. That official was in authority and responsible for the retention of the plaintiff, not the defendants. If they had desired to release him they could not have done so in the face of the explicit instruction by the keeper that he should be left in confinement. The keeper knew where he was confined, the reason for it and approved of it by ordering that it be continued.

The damages were not limited to the act of placing and leaving the plaintiff in the cell, but extended to the deprivation of his freedom for the entire day, although the keeper and not the defendants was responsible for this continued incarceration.

Again, the court erred in refusing to permit the defendants to show the instructions which had been given to them by the keeper relative to the care of inmates and the enforcement of the rules pertaining to their conduct. If this evidence had been received, we assume it would have established that the defendants were

App. Div.]

Fourth Department, March, 1906.

keeping within the exact scope of their directions in their treatment of the plaintiff. The evidence would further have tended to show that while these defendants were employed as engineers they were also charged with the duty of looking after the inmates and confining them in the cell if engaged in violating the rules or any improper conduct, and would have exonerated them from the charge of interfering without any authority.

The counsel for the plaintiff in order to prevent the reception of these instructions withdrew any claim of actual malice or for punitive damages. The competency of the proof was not limited to that subject. It was proper to explain the reason for the intervention of the defendants. The disclaimer of actual malice exculpated the defendants from any accusation of confining the plaintiff because of personal pique or ill-feeling, and to a large degree eliminated the question of an altercation between the individuals, and which in the charge was made the gravamen of the action.

If the rule adopted in this case is to prevail there will be no safety in any person connected with a charitable institution, except the keeper or superintendent, attempting to interfere with an unruly inmate. If both of these functionaries happen to be absent from the premises a riot might occur, and the assistants could not put any of the participants in a room in order to quell the disturbance without undergoing the risk of an action for damages and with meagre opportunity to justify their interference. In every instance it would be termed a personal altercation between the rioting inmate and the attendant. If the latter is making an arrest within the ordinary signification of that term, he must take the offender before a magistrate or deliver him to a peace officer without unnecessary delay. (Code Crim. Proc. § 185; *Tobin v. Bell*, 73 App. Div. 41.)

We ought not to dignify this confinement of the plaintiff by calling it an arrest within the meaning of the section of the Criminal Code mentioned. Such a construction is unreasonable and would be subversive to the discipline and order necessary to the successful management of the institution.

The plaintiff directed his obscene and profane language to the defendants. It is urged that for this reason the affair was with the defendants personally and involved no interference with the order or discipline of the institution. The indecent conduct was com-

mitted on the premises. To justify his apprehension it was not necessary that all the inmates be collected to listen to the unseemly language of the plaintiff. He cannot be relieved from the effect of his misconduct on that pretext. Had the keeper confined the plaintiff for the precise violation for which the defendants placed him in the cell no one would claim the keeper would be liable to the plaintiff in damages.

Authorities are cited in the dissenting opinion holding that where a body is vested with the authority to perform certain acts involving judgment and discretion, there can be no delegation of the power. For instance, a board of excise charged with such duties may not delegate their performance. (*Board of Excise v. Sackrider*, 35 N. Y. 154.) So a common council may not commit to another a public duty intrusted to it. (*Birdsall v. Clark*, 73 N. Y. 73.) And where a board of assessors were required by the city charter to act jointly, they may not confer the duty upon one member of the board. (*Providence Retreat v. City of Buffalo*, 29 App. Div. 160.)

These authorities have no application to the case we are considering. The maintenance of discipline is essential to the successful management of the institution. A room is provided for the temporary lodgment of intractable inmates. Certain of the employees or attendants are directed to confine in this room any inmate openly engaged in disturbing the peace or guilty of misbehavior, and promptly to report to the keeper or official in charge. This rule or mode of operating the institution is no infraction of the principle upon which the authorities cited rest. The character of the institution and the necessity for the preservation of order require that others aside from the keeper, who may not always be present, be given authority to act in the limited way in which these defendants did in this case.

The judgment and order should be reversed and a new trial granted, with costs to the appellants to abide the event.

All concurred, except McLENNAN, P. J., who dissented, in an opinion.

McLENNAN, P. J. (dissenting):

I cannot concur in the proposition enunciated in the prevailing opinion, that a common laborer employed in one of the county

App. Div.]

Fourth Department, March, 1906.

houses of the State may imprison and restrain of his liberty an inmate for using profane or obscene language directed to such laborer, especially when such language is not used in the presence of other inmates or under such circumstances as to create a disturbance or interfere with the general discipline of such institution, or that such imprisonment may be justified by a previous verbal delegation of authority by the keeper or superintendent of such institution to such laborer, or that such a subsequent ratification or approval of such imprisonment for such cause by the keeper, made in the absence of the inmate and without giving him an opportunity to be heard, will in any manner relieve the laborer from full liability for all the consequences of such imprisonment if originally wrongful.

This action was brought to recover the damages sustained by the plaintiff, alleged to have been caused by reason of his unlawful imprisonment by the defendants. During the progress of the trial plaintiff's counsel waived any claim for punitive or exemplary damages. The jury rendered a verdict in favor of the plaintiff for only sixty-five dollars, which presumably is the amount of actual damages sustained by him. At least it is not claimed upon this appeal that the verdict is excessive. The plaintiff, who was the only witness sworn in his behalf, testified in substance that he was an inmate of the county house of Onondaga county and had been for upwards of two years; that he was sixty-seven years of age; had been a cripple for eight years previous and practically incapacitated from doing any manual labor; that at the time in question the defendant Crysler was employed as engineer and that the defendant Shea was his assistant or helper, both being common laborers and having no official responsibility for the government or management of the institution so far as is disclosed by any adopted or published rules of the institution or by any law of the State.

The plaintiff testified that at about seven o'clock on the morning of the 21st day of September, 1904, in seeking to take care of certain garbage as he was instructed to do, he went to the engine room where the defendants were engaged, for the purpose of putting said garbage in the furnace to be consumed; that when he entered, there being no other inmates present, he charged the defendant Shea with having stolen a bag of nuts which belonged to him; that

thereupon such defendant, without any other cause or provocation, called the defendant Crysler, determined that the plaintiff should be locked up, and thereupon they forcibly placed him in a cell and there kept him all day, practically without anything to eat or drink, they, the defendants, saying to him at intervals that if he would retract the statement that Shea had stolen his bag of nuts, which he refused to do, they, the defendants, would release him from imprisonment.

The defendants' version of the transaction is in substance that when the plaintiff came to the engine room and charged the defendant Shea with having stolen the nuts in question, he, Shea, denied the charge; that thereupon the plaintiff called Shea a "damned liar," "a son of a bitch," and used other profane and obscene language; that the plaintiff drew or attempted to draw a knife from his pocket, threatening at the same time to do bodily harm to the defendant Shea; that thereupon he, Shea, called to Crysler; that they were afraid bodily harm would be done them by the plaintiff and for that reason they determined to confine the plaintiff in a cell, which they did, and kept him there for practically twelve hours, but frequently stated to him that if he would retract the charge which he had made as to the stealing of the nuts, or would promise to refrain from using violence as threatened, he would be discharged from imprisonment; that the plaintiff refused to so retract or promise, but after about twelve hours of imprisonment he was released.

The learned trial court charged the jury that "the detention was a wrong on the part of the defendants unless, because of the threats or actions of the plaintiff, they, as reasonable men, believed, and had a right to believe, that they were in danger of bodily harm or injury unless the plaintiff was detained. In that event, and in that event only, they had the right to detain the plaintiff until they could reasonably obtain a warrant or obtain his arrest in some legal or proper way."

The jury found that the defendants had no just cause to apprehend bodily harm from the old, crippled plaintiff, and so rendered a verdict in his favor for sixty-five dollars, and from the judgment entered thereon this appeal is taken.

We think it is elementary that if the plaintiff's version of the



App. Div.]

Fourth Department, March, 1906.

transaction is correct, or even if as claimed by the defendants, he used profane and obscene language, they were not justified in punishing him by imprisonment for such alleged offense; the words and conduct of the plaintiff, if we eliminate his alleged threats which it is claimed caused the defendants to apprehend bodily harm would be done them, all of which are eliminated by the verdict of the jury, in no manner tended to create a disturbance or a breach of the peace, and did not interfere with any rule of discipline with the enforcement of which the defendants were concerned or for which they were responsible. They were employed solely for the purpose of looking after the conduct of the engines and boilers and not of the inmates of the institution, and it can hardly be claimed that by reason of their right to perform the first duty they had the power to assume the responsibility involved in the discharge of the latter. A father may punish his child for a failure to obey his commands or other misconduct, but it has never been held that the hired man may inflict punishment for such causes without becoming liable to the infant therefor, and so notwithstanding the father may have authorized such action. A warden of a prison or his deputy, a superintendent of an asylum or his subordinates duly authorized in that regard, may summarily restrain the inmates of their liberty for the violation of the rules and regulations of such institutions, but we venture the suggestion that it has never before been held that the hired man or hired girl, the assistant engineer or other common laborer in such an institution, may assume to punish an inmate for the violation of a rule, where such violation does not tend to disturb the peace of the institution, the safety or comfort of the other inmates, and was not of such character as to occasion fear of bodily harm to the employee who assumed to so act in the premises. If we keep in mind the fact that the question of defendants' fear of bodily harm has been eliminated by the verdict of the jury, the case at bar is a most forceful illustration of what the adoption of the rule contended for by the appellants would lead to. With that eliminated, the version of the transaction as claimed by the appellants is that the plaintiff found the defendant Shea alone, and charged him with having stolen some nuts, which for aught we know was true; Shea, however, denied the charge and the plaintiff told him he lied, which, of course, he did if the

charge of theft was well founded. The discussion became more heated and the plaintiff told Shea that he was something worse than a liar, which latter charge we may assume was incapable of proof. Shea then called to his assistance another hired man, the defendant Crysler, and they concluded to summarily and effectively end the controversy by restraining the plaintiff of his liberty, and by way of punishing him for having dared to charge the hired man with stealing nuts, being a liar and other things, all of which perhaps were true, they prescribed bread and water as a diet for the plaintiff during his confinement. The extent of such confinement, I suppose, was determined by the rules applicable to "indeterminate sentences," or more probably to the sweet will of the prisoners. At all events, by reason of the summary action of the defendants in the premises we shall never know whether the charges made by the plaintiff against Shea were true or false.

Seriously, it seems to me that the right of personal liberty, even of a pauper in a county house, is too sacred to permit of its destruction in such fashion or by any such pretense. The right of personal liberty is universal, save only as it is subject to such exceptions as are necessary for the common welfare of society. At common law a private citizen without warrant might lawfully seize and detain another in certain cases. It is justifiable to hold a man to restrain him from mischief; it is lawful to interfere in a fray which endangers the lives of the combatants. Under the right of self-defense it is lawful to seize and restrain any person incapable of controlling his own actions, whose being at large endangers the safety of others, but such action under these exceptions is only justifiable when the urgency of the case demands immediate intervention. The right to exercise this summary remedy has its foundation in a reasonable necessity and ceases with the necessity. A dangerous maniac may be restrained temporarily, but only until he can be safely released or can be arrested upon legal process or committed to the asylum under legal authority, and a person, although insane, if not dangerous, may not thus be arrested and restrained. The right of personal liberty is too sacred to be left to the determination of an individual not charged with any duty in the premises.

The imprisonment or restraint of the plaintiff in the case at bar

App. Div.]

Fourth Department, March, 1906.

does not come within any of the exceptions alluded to or to which our attention has been called. As found by the jury he was not dangerous; he was creating no disturbance in the presence of the other inmates; he was simply engaged in a wordy altercation with the defendant Shea, only themselves being present. The defendants, as we have seen, were not charged with any duty with respect to the management of the institution or with the enforcement of any rules relating to its government or discipline, and we, therefore, conclude that the defendants had no right or authority to imprison and restrain the plaintiff of his liberty for any cause suggested by the evidence, other than the alleged fear of bodily harm, which was eliminated by the verdict of the jury.

It is urged in the prevailing opinion that certain exceptions present reversible error. It seems to me they are all disposed of by the proposition, if correct, that the imprisonment of the plaintiff by the defendants was wholly unjustifiable because the alleged offense was not of such a character as to justify summary punishment in any event, or such as to authorize action in the premises by the defendants. However, the questions presented by such exceptions will be considered.

The defendants offered in evidence certain printed rules and regulations for the government of the Onondaga county poorhouse which presumably had been prepared by the superintendent of the poor and approved by the county judge of Onondaga county on the 1st day of January, 1871. Such rules were excluded, an exception duly taken, and it is urged that their exclusion was error. It will be assumed that such rules were authorized by law and approved in accordance therewith. We think an examination of the rules offered, which are contained in the record, clearly shows that they had no relevancy to any issue involved in this case. It is only claimed by appellant's counsel that rules 10 and 11 are pertinent. Those are as follows:

"10. Punishment will be inflicted on all those who are guilty of drunkenness, disorderly conduct, profane or obscene language, theft, waste of food or any other waste whatever.

"11. The keeper will be vigilant in detecting every negligent or wilful violation of these rules, and will promptly inflict the most exemplary punishment; and in all cases of solitary confinement for

criminal conduct the person's diet shall consist solely of bread and water, while those who conduct well will receive kind treatment and every reasonable indulgence."

There is nothing in either of these rules which would authorize an employee at the county house to inflict punishment on any inmate who is guilty of the use of "profane or obscene language." Rule 11 provides: "The keeper will be vigilant in detecting every negligent or wilful violation of these rules, and will promptly inflict the most exemplary punishment \* \* \*." Nowhere in such rule is it suggested that the engineer, assistant engineer, or any other employee, may inflict punishment upon the inmates of such institution because of their use of "profane or obscene language."

Number 1 of such rules provides: "At the ringing of the bell in the morning every person (the sick excepted) must rise from their beds, dress and repair to the place for washing, there wash themselves and then immediately commence the work assigned them by the keeper or matron." It will hardly be claimed that if one of the inmates neglected to rise from his or her bed that the hired man or hired girl could imprison such inmate for a violation of such rule.

There being nothing in the rules excluded by the learned court which had any bearing upon any issue involved upon the trial, or which would authorize the defendants to imprison the plaintiff because he directed "profane or obscene language" to them, their exclusion was not error.

Again, it is suggested that it was error to exclude the evidence offered by the defendants to the effect that after they had imprisoned the plaintiff they reported the facts and circumstances to the keeper, and that he approved of their action in the premises and directed that the imprisonment of the plaintiff be continued. If the imprisonment of the plaintiff by the defendants was originally illegal, any ratification or approval of their acts by the keeper could not make it legal or lawful, or relieve them from all the consequences of their wrongful act. (*Mandeville v. Guernsey*, 51 Barb. 99.)

In writing the opinion in that case the late Justice JAMES C. SMITH said: "A person who has arrested a party without process, or on void process, wrongfully, cannot detain him on valid process until he has restored such party to the condition he was in at the

App. Div.]

Fourth Department, March, 1906.

time of his arrest, at least to his liberty." The reason and justice of the rule thus enunciated is fully illustrated in this case. If we assume that the keeper had, in his discretion, the authority to imprison the plaintiff because of his use of "profane or obscene language" it by no means follows that such punishment would have been imposed if he had first acted in the premises, had seen the plaintiff and had heard his story. We think it will not do for the defendants to say that upon their *ex parte* statement and without hearing the plaintiff, the keeper ratified their action and that now they may claim immunity from the consequences of their acts because of such ratification. Under the rule suggested by Justice SMITH it was at least their duty to have released the plaintiff and then have permitted the keeper to determine whether or not the plaintiff deserved punishment and what the punishment should be. No case has been called to our attention in which it has been held that a person who has unlawfully imprisoned another may shield himself from the consequences of such unlawful act by asserting that after the imprisonment took place his conduct in that regard was approved by someone who would have had in the first instance authority to have caused such imprisonment, such pretended approval being given in the absence of the imprisoned person and without any opportunity on his part to be heard.

Again, it is urged that the learned trial court committed reversible error in refusing to permit the defendants to prove that previously they had been verbally authorized by the keeper to punish inmates of the institution for an infraction of the rules, as applicable to this case, for using profane and obscene language. As already indicated, we think no such delegation of authority by the keeper to imprison or to punish could lawfully be made, and that it did not in any manner relieve the defendants from the consequences of their illegal acts. No question of punitive or exemplary damages is involved. We are only concerned in ascertaining whether or not the plaintiff's imprisonment was illegal. If it was, he is entitled to the actual damages sustained thereby.

We conclude that no verbal delegation of authority by the keeper to the defendants would justify them in imprisoning the plaintiff under the circumstances disclosed by the evidence, and that, therefore, the trial court properly excluded the evidence offered to

establish the delegation of such authority. The rule which was offered in evidence specifically states that the keeper shall inflict the punishment. No right is conferred upon him by such rule to delegate his authority in any respect. The rule requires the exercise of his judgment and discretion in inflicting punishment upon the poor confined in his institution, and consequently he cannot delegate his authority by substituting the judgment and discretion of an engineer or fireman in inflicting punishment upon the inmates confined in the institution, even as to the future government of the inmates in matters where the institution is interested. (*Providence Retreat v. City of Buffalo*, 29 App. Div. 160; *Powell v. Tuttle*, 3 N. Y. 396; *Board of Excise v. Sackrider*, 35 id. 154; *Birdsall v. Clark*, 73 id. 73; *Burke v. Burpo*, 75 Hun, 568.)

The facts in this case are simple. If the plaintiff's version of the transaction is true, no one would claim his imprisonment could be justified, no matter what authority had been delegated by the keeper to the defendants, or whether or not their acts in the premises had been ratified. The claim made by the defendants that they were afraid and had reasonable cause to fear that bodily harm would be done them by the plaintiff has been eliminated by the verdict of the jury. It, therefore, only remains to determine whether an inmate of a county house may be restrained of his liberty by a common laborer because such inmate uses profane and obscene language to such laborer in a personal altercation not in the presence of other inmates, even if verbally authorized so to do by the keeper of such institution, or whether or not such laborer may thus illegally imprison and escape full liability for the consequences of such imprisonment because the keeper may see fit to ratify such illegal and wrongful act. We are constrained to hold that the learned trial court submitted the issues of fact in this case to the jury upon the correct theory, and that his rulings upon the admission and rejection of evidence were absolutely correct, and that the judgment and order appealed from should be affirmed.

Judgment and order reversed and new trial ordered, with costs to the appellant to abide the event.

App. Div.]

Fourth Department, March, 1906.

SARA BERWICK PARSONS, Respondent, v. GEORGE R. TELLER, as Administrator with the Will Annexed, etc., of DAISY FLETCHER KING SMITH, Deceased, Appellant.

Fourth Department, March 7, 1906.

**Executors and administrators — contract by decedent to pay annuity to friend — when consideration sufficient — infancy — when such contract made by infant ratified at majority — when such contract governed by law of this State.**

The plaintiff, an intimate friend, companion and attendant of the decedent, was given a contract by the decedent by which the decedent promised to pay an annuity to plaintiff. The first memorandum of this contract was in the form of letters between the parties written at a time when the promisor was an infant. Subsequently on the marriage of the promisor while still an infant, a formal sealed contract was executed to which the husband and father of the infant were also parties and assumed a personal liability thereon. The consideration stated was the obligation of the prior agreement, services heretofore performed by the promisee and one dollar in hand paid. From that time until the death of the promisor some years after attaining her majority payments were made regularly on said contract. In an action to enforce the contract against the administrator of the promisor,

*Held*, that the agreement was founded upon a valuable consideration consisting of the care and attendance rendered by the promisee to the decedent and subsequent services rendered to her brother; that the value of the services as compared with the amount of the annuity was immaterial; that the promisor alone was competent to set the value of said services; that the prior agreement made by letter during the infancy of the promisor, although voidable, furnished a consideration for the formal contract made in lieu thereof;

That, although both contracts were executed during the infancy of the promisor, the ratification thereof at her majority was fully established, as the annuity was paid for eight years after the promisor's majority and until her death;

That the validity of the ratified contract of an infant is not to be determined by the question as to whether it is to her benefit or prejudice.

*Held*, further, that the recitals of the consideration in the agreement, although made by an infant, were binding and were evidence against her estate because said contract was ratified at the promisor's majority. It is only when there is no ratification that an infant is not estopped by recitals of consideration in an instrument;

*Held*, further, that, although the decedent had removed to England after her marriage, the contract being executed and ratified in this State, and to be performed here, was governed by the law of this State.

*Held*, further, that, although the promisor had also made a provision for the promisee by will, the question as to whether such provision was to be in lieu of the contract could not arise unless the defense were pleaded, when there is nothing in the record to show that the plaintiff claimed both provisions.

McLENNAN, P. J., and NASH, J., dissented, with opinion.

APPEAL by the defendant, George R. Teller, as administrator with the will annexed, etc., of Daisy Fletcher King Smith, deceased, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Erie on the 6th day of February, 1905, upon the decision of the court rendered after a trial at the Erie Trial Term, the jury having been discharged.

The plaintiff is a maiden lady residing in Buffalo. The defendant's testatrix, in her early girlhood, by name Daisy King, lived with her grandmother, Mrs. Pratt, in that city until the latter's death in 1885, when the child was thirteen years of age. In 1878 the plaintiff also became a member of Mrs. Pratt's family, remaining in the household until 1884, assisting in the care and education of Daisy, whose mother had died before the child was cared for by the grandmother. While an inmate of Mrs. Pratt's household the plaintiff was paid nothing for her services, but was supported as one of the family. Shortly after the death of Mrs. Pratt the girl went to New York and lived with the plaintiff for two years. They then took a six months' trip to Europe, and upon their return Miss King lived in a hotel or apartment house in New York and the plaintiff lived with her. Whether the plaintiff was paid for her services while abroad does not appear. She was incompetent to testify on the subject in her own behalf, and the defendant did not see fit to cross-examine her or give any proof in relation to the matter. In December, 1890, Miss King, then eighteen years of age, intermarried with Willoughby Smith, a subject of Great Britain, and thereafter they resided in England until her death. Mrs. Smith, and her husband also, possessed considerable wealth.

The relations existing between Mrs. Smith and the plaintiff were affectionate, and after the marriage Miss Parsons spent most of her time in England and Paris, and was a frequent and welcome visitor at the Smiths.

On March 1, 1888, the plaintiff wrote the following letter to Miss King:



App. Div.]

Fourth Department, March, 1906.

*"March 1st, 1888.*

"MY DEAR DAISY.—As you have often expressed your willingness to give me the sum of eighteen hundred dollars per year until you arrive at the age of twenty-one years, if you will write me to this effect I shall be very grateful.

"Yours faithfully,

"SARA B. PARSONS.

"To Miss DAISY F. KING."

Miss King, then sixteen years of age, replied as follows:

*"503 FIFTH AVE., N. Y., Mch. 2, 1888.*

"MY DEAR SARA.—Your letter of the 1st inst. received. I am perfectly willing to give you the sum therein mentioned (\$1800 per year) until I reach the age of twenty-one years. I think I can say in all truth and sincerity that there are few with whom I could have been constantly day and night as I have been with you and always have found them the same, true, devoted, faithful, fond, always willing to share and sympathize with me in my sorrow or joy as the case may have been. I can assure you that I appreciate all your kindness in past years, and if at any time I can aid you or yours in any way it will only be a great pleasure to me to do so if such an occurrence may present itself. I trust we may always be together, that is until either may find the proper person, one to whom we may give our heart, and even after that. I agree to your offer and with many, many thanks, I am,

"Your sincere friend,

"D. F. KING."

A few days after her marriage Mrs. Smith, her husband and father entered into an agreement in writing with the plaintiff. The agreement recites that, "Whereas," Miss Parsons, "heretofore entered the employment of the said Daisy King Smith, then Daisy Fletcher King, upon the agreement that such payment should be continued whether so employed or not, or she be otherwise provided for in case of the marriage of said Daisy Fletcher King," and then recites the marriage with Smith, her intention to live in England and desiring "to carry into effect such agreement and understanding," continues, "Now, therefore, in consideration of the premises, the services heretofore performed by said Parsons and of one dollar

to them in hand paid, the receipt of which is hereby acknowledged," the said parties covenanted and agreed to pay to Miss Parsons during her natural life the said sum of \$1,800 annually in equal quarterly payments, "and the parties of the first part do hereby bind themselves, their heirs and representatives accordingly."

The father, as general guardian of Mrs. Smith, was directed to make these payments out of moneys belonging to her in his custody, and she agreed to confirm and ratify the same upon attaining her majority. The contract further provided that in case Mrs. Smith died the liability of her husband, by virtue of the agreement, should terminate. The contract was under seal and executed by all the contracting parties.

The allowance was paid in monthly payments during the minority of Mrs. Smith. After she reached the age of twenty-one years she had property in America producing an income and under the charge of the defendant, her agent. Remittances of this income were from time to time made to her in England, and the avails were placed to the credit of her husband, as she kept no separate account. For several years Miss Parsons was in England chiefly caring for an elder brother of Mrs. Smith, and Mr. Smith, by direction of his wife, paid her in pounds and shillings the equivalent of \$150 a month. The first payments after Mrs. Smith became of age were paid by the defendant, as her agent, in the United States. Mr. and Mrs. Smith were on a visit to this country and she personally requested her agent to make these payments. The stipend, pursuant to the contract, was paid monthly by her direction until her death. Concededly the only obligation imposing these payments was the written agreement between the parties. Mrs. Smith, in speaking of these payments, referred to the agreement and it was found among her papers after her decease.

In 1893, shortly after becoming of age, she executed her will in which she directed her trustees to invest £8,000 and "to pay the income thereof to my friend Sara Berwick Parsons \* \* \* during her life." On March 11, 1897, she executed her last will, which contained a like provision for the benefit of Miss Parsons.

Mrs. Smith died in England in February, 1902. Letters of administration, with the will annexed, were issued to the defendant by the Surrogate's Court of Erie county. The plaintiff presented

App. Div.]

Fourth Department, March, 1906.

to him her claim pursuant to the written agreement, which was rejected, and this action was thereupon commenced. Other facts appear in the opinion.

*John G. Milburn*, for the appellant.

*Lyman M. Bass*, for the respondent.

SPRING, J. :

At the close of the evidence each party moved for the direction of a verdict. By consent of the parties the jury was discharged and the case submitted to the justice presiding, who subsequently rendered his decision containing findings of fact and conclusions of law and directed judgment in favor of the plaintiff. The facts are found in the decision with great detail and settle the conflicting facts and any inferences fairly deducible therefrom in favor of the plaintiff. Each finding is supported by evidence to sustain it and a new trial should not be ordered unless we are satisfied that the decision in its material features is decidedly contrary to the evidence.

It is claimed by the learned counsel for the appellant that the written agreement was without consideration and that it was not ratified by Mrs. Smith after she attained her majority, and these contentions comprise the principal questions requiring consideration.

The agreement on its face imports a valuable consideration. The presence of the seal and the acknowledgment of the receipt of one dollar imply a consideration (*Mutual Life Ins. Co. v. Yates County Nat. Bank*, 35 App. Div. 218; *Matter of Steglich*, 91 id. 75; 6 Am. & Eng. Ency. of Law [2d ed.], 762; 2 Whart. Ev. § 1045), which may be rebutted by extraneous proof. (*Baird v. Baird*, 145 N. Y. 659.) Eliminating, however, the effect of the seal and the acknowledgment of payment, the agreement is founded on services performed by the plaintiff while in the employment of Miss King, and for which she had agreed to pay. Had Mrs. Smith been an adult the agreement in and of itself would have been sufficient to enable Miss Parsons to recover upon it, unless its validity was impeached by proof.

It becomes important, therefore, to refer to the evidence for the purpose of ascertaining if the recitals of employment and service

in the agreement have been entirely disproved. In order to comprehend the scope of the agreement, it is essential to keep in mind the relations of these two people. Miss King was a motherless child who was living with her grandmother; and the plaintiff at thirty-two years of age came into the family when the child was six years of age and remained there for six years. They were together daily. They occupied the same bed. The plaintiff cared for the girl, assisted in her education, and they became closely attached to each other. After the death of the grandmother Miss King lived with the plaintiff in New York, and their keen affection existed unabated until the death of Mrs. Smith. For the services rendered the plaintiff received no compensation in money. It may be that none was expected to be paid. In any event, the services were valuable, and were so regarded by Miss King, and they were sufficient to constitute a valuable consideration for the promise to pay therefor. The adequacy of the price paid or promised is not significant. Miss King had property to the amount of \$300,000. She had been reared in affluence. She alone had the right to measure the value of the employment and companionship of her friend. It is not for another to determine that she paid in excess of their real worth, and her agreement to extend the term of payment during the lifetime of the plaintiff cannot be overthrown because we may conclude that the plaintiff did not earn the full sum which Mrs. Smith chose to pay her. (*Yarwood v. Trusts & Guarantee Co., Ltd.*, 94 App. Div. 47; appeal dismissed, 182 N. Y. 527; *Earl v. Peck*, 64 id. 596.)

The agreement was executed as Mrs. Smith and her husband were about to depart from this country for their future home in England. In entering into the agreement she was not acting alone or unadvisedly. Her husband and father were parties to the contract and they personally became liable for the payment of the allowance which she fixed upon as the remuneration for the services rendered. The contract was drawn by her lawyer. The solemn recitals of consideration were not stealthily inserted in it or without her knowledge. The attorney was not preparing this important agreement for his client without information concerning the consideration. He ascertained the inducement for the agreement and embodied it clearly therein. There is no suggestion and there

App. Div.]

Fourth Department, March, 1906.

could not be of any overreaching in the preparation of the contract. So just was it, apparently, that her nearest relatives sanctioned it and were responsible for its performance. The prior agreement, even though voidable at the will of Miss King, denoted an intention to compensate the plaintiff. It was in effect canceled and the one in controversy substituted. Its cancellation was sufficient consideration for the more formal and explicit instrument. (*Hamer v. Sidway*, 124 N. Y. 538; *Melville v. Kruse*, 174 id. 306.)

The two letters quoted, which are the first indication of any intention to pay, do not militate against the contractual liability. These ladies were close friends. We would not expect in their letters, filled with outbursts of affection, to find the one asserting a debt and the other insisting that any payment made was voluntary. There was no enforceable demand. Miss King was a minor during all the time of the rendition of the services which induced the agreement. When she approached womanhood, realizing that the services had been valuable to her and that her friend was needy, she saw fit to impose upon herself their payment as an obligation. The correspondence denotes that the amount had been the subject of conversation and had been agreed upon between them, and that sum was adhered to from the beginning. One or two of the witnesses testified that Mrs. Smith said these payments were voluntarily made by her. They were originally. She could not have been made to pay. She was animated by her love and affection in undertaking to compensate where no debt could have been established. None the less, the compelling moral obligation did not wipe out the services rendered upon which she had the right to put a money value and by a binding agreement assume their payment according to her own estimate.

Her declarations, if competent, are not sufficient to warrant the setting aside of the judgment in view of the other evidence contained in the record, and all of which was considered by the trial justice in arriving at his conclusion.

These facts are established by evidence which is substantially undisputed. We think, therefore, the appellant has not affirmatively established that the agreement was without a valuable consideration, but on the contrary, the facts affirm its validity.

It was, of course, essential to the validity of the agreement that

it be ratified after Mrs. Smith became of age. The adoption of the agreement required no new consideration. There must be the confirmation, the definite recognition of the antecedent obligation, but nothing beyond to make it effective. Within the strict rule stated in the brief of the counsel for the appellant Mrs. Smith confirmed the agreement after attaining her majority. The payments after that time were regularly made according to her direction. She was nearly nineteen years of age at the time the contract was entered into. It must have been made at her instance. She was a married woman and, undoubtedly, comprehended the nature and extent of the obligations she had assumed. She retained the agreement or a copy of it. There was no other agreement whereby she was called upon to pay the plaintiff. She recognized its existence in talking with her friends and with the defendant, her agent. In her letters to the plaintiff she referred to her allowance.

For eight years without interruption she caused the sum, which she had covenanted to pay, to be turned over to the plaintiff. An intelligent lady, with abundant means, with the active co-operation of her husband, she met the obligation graciously undertaken while a minor. She paid understandingly. It is too late now to claim that she did not intend to conform to the terms of the written agreement entered into with so much solemnity.

If Mrs. Smith the year before her death had attempted to repudiate this agreement, claiming that it was without consideration and that it had not been ratified by her, the endeavor would have been unavailing if based on the proof contained in this record. The contract was not void. The authorities are quite uniform in maintaining the principle that the contract of an infant is voidable only, irrespective of whether for his benefit or to his prejudice. (*Blinn v. Schwarz*, 177 N. Y. 252; *Henry v. Root*, 33 id. 526; 2 Kent Comm. 234 *et seq.*; 1 Pars. Cont. [5th ed.] 293 *et seq.*; 2 Black. Comm. 291; 16 Am. & Eng. Ency. of Law [2d ed.], 272 *et seq.*)

Mrs. Smith, on becoming of age, might have entered into a new agreement with like import to the old one. She preferred to keep the old one alive. She had the same power to do this as to enter into an independent contract.

It is claimed there was no ratification because Mr. Smith made

App. Div.]

Fourth Department, March, 1906.

the payments to the plaintiff. The money of his wife was deposited with his bankers to his credit, and he testified that it was his wife's wish that these payments should be made. The acknowledgment of payment in each instance was made by the plaintiff to Mrs. Smith, although the check was that of her husband. Commencing with 1899 and continuing until the death of Mrs. Smith, the payments were made monthly in this country by Mr. Teller, her agent and the custodian of her funds, and each statement rendered by him to her showed these payments made each month. A more complete recognition of the agreement cannot be conceived.

Again, it is contended that the recital of consideration in the agreement is not binding on Mrs. Smith because she was an infant at the time of its execution, and authorities are cited holding that the admissions of an infant are not binding against him. In these cases there had been no ratification, and the admissions made during infancy were attempted to be used to establish an estoppel or a liability notwithstanding the failure to show an affirmance of the agreement. In *Sims v. Everhardt* (102 U. S. 300), cited in the dissenting opinion, the infant had executed a deed during her minority asserting that she was of age. There was no recognition of the deed after she attained majority, and she commenced an action to set it aside. It was claimed that she was estopped by her admissions made while she was an infant. The court held that the declaration could not be resorted to in order to uphold an agreement which depended upon her affirmance after she became of age to give validity to it. The court said (at p. 313): "The question is whether acts and declarations of an infant during infancy can estop him from asserting the invalidity of his deed after he has attained his majority." The court further said that the conveyance itself "is an assertion of his right to convey," and nothing is added to it by a contemporaneous admission.

The recitals in the agreement amount to an admission or declaration by Mrs. Smith that she owed the plaintiff for services while under age, at which time she had reached sufficient maturity to comprehend the scope and force of the declaration, and it is competent evidence against her tending to establish a consideration for the agreement. When Mrs. Smith became of age she ratified the agreement; not a portion, but the agreement as it existed. That

indorsement was equivalent to a new agreement. The ratification carried with it a recognition of the agreement to its fullest extent, and the recitals thus became effective against her.

Of course, the agreement was in no part valid during the infancy of Mrs. Smith, and its validity depended upon her own conduct after she became of age. Its affirmance or disaffirmance rested entirely with her, and she elected to make this precise agreement valid and binding against her.

The agreement was executed in this State. It was expected to be performed here. The plaintiff was a resident of New York, and this had been the home of Mrs. Smith. The services had been rendered here. Mrs. Smith's property was in this State, and in part, at least, remained invested here. After she became of age she was in this country and directed her agent to pay the allowance to Miss Parsons, so the initial ratification was in the State of New York. The confirmation of the agreement by Mrs. Smith made it operative from its inception. In these circumstances the agreement is to be governed by the laws of the State of New York.

The effect of the bequest in the will of Mrs. Smith for the benefit of the plaintiff is not before us. That provision may have been intended as a substitute for the allowance fixed by the agreement. No such defense is pleaded, and no such question is suggested in the brief. There is nothing in the record to indicate that Miss Parsons is claiming both provisions. If such is her position, and the effect of the will upon the contract were to be considered upon this appeal, an entirely different situation might be presented. In any event the plaintiff has elected to enforce the agreement. If she is not entitled to take pursuant to the will, and also recover upon the contract, her election has been made. (*Carulfield v. Sullivan*, 85 N. Y. 153.)

There is no proof that the trust bequest under the will has been set apart for the benefit of the plaintiff, or that any payment or tender of payment pursuant to its terms has been made. There is no warrant in the record for the statement that she is seeking to recover \$3,600.

We have simply to determine the validity of the agreement, with the inferences and facts, so far as they are conflicting, resolved in favor of the plaintiff, and we cannot be led away from this plain



App. Div.]

Fourth Department, March, 1908.

path by the suggestion that the plaintiff is endeavoring to take both by virtue of the will and of the agreement. Such an assumption may be entirely unwarranted.

The judgment should be affirmed, with costs.

All concurred, except McLENNAN, P. J., and NASH, J., who dissented in an opinion by McLENNAN, P. J.

McLENNAN, P. J. (dissenting):

The action was commenced on the 10th day of September, 1903, to recover the amount alleged to be due and owing to the plaintiff under and by virtue of a certain contract bearing date the 18th day of December, 1890, executed by the defendant's testatrix, who at the time was an infant. The defenses to plaintiff's alleged cause of action are in effect that the contract was not ratified by the testatrix after she became twenty-one years of age and that there was no consideration for the same. The facts, so far as deemed important, are stated in the opinion.

Daisy Fletcher King, defendant's testatrix, was born in March, 1872. Her mother died during her infancy and she with her two brothers, both older than herself, went to live with their grandmother, a Mrs. Pratt, at her home on Delaware avenue in the city of Buffalo, N. Y., and so continued until the death of the latter, which occurred in 1885, when the testatrix was thirteen years of age. The plaintiff became a member of the grandmother's household in 1878, when the testatrix was six years old, and so continued until about a year before the grandmother's death, when the plaintiff went to New York to live with her mother and sister. Concededly, while living with Mrs. Pratt the plaintiff aided and assisted in caring for and bringing up the testatrix, but there is not a line in the evidence to indicate that she was not fully compensated for any and all services thus rendered by her. After the grandmother, Mrs. Pratt died, the testatrix with one of her brothers, who was seven years older, went to live with the plaintiff at a boarding house kept by her in New York city. The testatrix lived there and attended a day school for a little over two years or until the beginning of the year 1888, when with the plaintiff she went to Europe, where they stayed about six months. She returned in the latter part of 1888, and took an apartment on Fifth avenue in New York city

where the plaintiff lived with her. During that time the plaintiff was in England for two months in 1890, taking charge of the testatrix's elder brother. There is no suggestion in the evidence that any services rendered by the plaintiff to Daisy King during this period were not fully paid for. Indeed, the contrary is very conclusively established from the fact that the testatrix was comparatively rich in her own right, and that the plaintiff was without property. We think it only fair from the evidence to assume that the trip to Europe and the cost of living in New York were paid out of the income of the testatrix. At least nothing is shown to indicate that whatever services were rendered by the plaintiff for or at the request of the testatrix were not fully paid for by her.

If we stop at this point and inquire, was the testatrix under any legal obligation to the plaintiff? the answer must be that there is no evidence to support such claim, but upon the contrary the facts lead irresistibly to the conclusion that any such obligations, if they existed, had been promptly and fully discharged as they arose.

On December 11, 1890, the testatrix, who was then eighteen years of age, was married to Mr. Willoughby Smith, who resided in London and was a subject of Great Britain. After the marriage she accompanied her husband to England, where she lived with him continuously until her death on February 9, 1902. On the 18th day of December, 1890, seven days after her marriage, the defendant's testatrix entered into the contract in question, which is as follows:

"This agreement made this eighteenth day of December, in the year one thousand eight hundred and ninety, between Daisy King Smith, wife of Willoughby Statham Smith and said Willoughby S. Smith, of London, England, of the first part, William J. King, as guardian of the said Daisy King Smith, of the second part, and Sara B. Parsons, now of Buffalo, of the third part.

"*Witnesses*: WHEREAS the party of the third part heretofore entered the employment of the said Daisy King Smith, then Daisy Fletcher King, upon the agreement that such payment should be continued whether so employed or not, or she be otherwise provided for in case of the marriage of said Daisy Fletcher King,

"And WHEREAS, said Daisy Fletcher King having now intermarried with said Willoughby S. Smith and intending to live in England, desires to carry into effect such agreement and understanding;

App. Div.]

Fourth Department, March, 1906.

" *Now, therefore*, in consideration of the premises, the services heretofore performed by said Parsons and of one dollar to them in hand paid, the receipt of which is hereby acknowledged, the parties of the first part have covenanted and agreed and hereby do covenant and agree to pay to the said party of the third part annually during her life, the sum of eighteen hundred dollars in quarterly payments of four hundred and fifty dollars each, and the parties of the first part do hereby bind themselves, their heirs and representatives accordingly;

" And WHEREAS, the said Daisy King Smith is now a minor of the age of eighteen years;

" And WHEREAS, the said party of the second part is her guardian, having in his custody her income during her minority, the parties of the first part do hereby authorize, empower and direct the party of the second part to pay the party of the third part such annuity commencing with the first day of December, 1890, and thereafter to pay the same pending the minority of the said Daisy King Smith from any income in his hands belonging to her and the receipts of the party of the third part shall be a good and sufficient acquittance to the party of the second part for all such payments.

" And the parties of the first part do hereby covenant and agree that they will indemnify and save harmless the party of the second part from any liability on account of any such payments and that so soon as Daisy King Smith shall attain the age of twenty-one years they will by their solemn instrument ratify and confirm all such payments

" But in case of the decease of the said Daisy King Smith the liability of the said Willoughby S. Smith under this agreement shall cease and determine.

" And the party of the second part hereby assents to the provisions hereof.

" In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

"DAISY KING SMITH, [SEAL]

"WILLOUGHBY STATHAM SMITH, [SEAL]

"WILLIAM J. KING, *Guardian*, [SEAL]

"SARA B. PARSONS, [SEAL]."

What induced the contract thus made is clearly indicated by the letters following, and which most emphatically preclude the idea of legal obligation :

“ *March 1st, 1888.*

“MY DEAR DAISY.—As you have often expressed your willingness to give me the sum of eighteen hundred dollars per year until you arrive at the age of twenty-one years, if you will write me to this effect I shall be very grateful.

“Yours faithfully,

“TO MISS DAISY F. KING.

SARA B. PARSONS.”

“503 FIFTH AVE., N. Y., *Feb. 2, 1888.*

“MY DEAR SARA.—Your letter of the 1st inst. received. I am perfectly willing to give you the sum therein mentioned (\$1800 per year) until I reach the age of twenty-one years. I think I can say in all truth and sincerity that there are few with whom I could have been constantly day and night as I have been with you and always have found them the same, true, devoted, faithful, fond, always willing to share and sympathize with me in my sorrow or joy as the case may have been. I can assure you that I appreciate all your kindness in past years, and if at any time I can aid you or yours in any way it will only be a great pleasure to me to do so if such an occurrence may present itself. I trust we may always be together, that is, until either may find the proper person, one to whom we may give our heart, and even after that. I agree to your offer and with many, many thanks, I am,

“Your sincere friend,

“D. F. KING.”

We venture to suggest that there is not a scintilla of evidence which indicates that at the time the contract in question was made the testatrix was under any legal obligation to the plaintiff; that she owed her one cent for services rendered and which could have been recovered in an action at law. On the day before the contract in question was executed, suppose the plaintiff had commenced an action to recover the value of services rendered by her for or on behalf of the infant. Would it be pretended that there is any fact disclosed by the evidence in this record which would have justified a recovery in that case? The alleged consideration because of

App. Div.]

Fourth Department, March, 1906.

future services is equally without foundation. By the terms of the contract the plaintiff does not bind herself or agree to perform a single act of service for or on behalf of the testatrix after the execution of the contract in question. Undoubtedly there was genuine love and affection by the testatrix for her friend, the plaintiff, who had for many years practically sustained the relation of mother to her; but we have never understood that such relation may constitute a consideration which will support a contract entered into by an infant. As well might a mother seek to recover in an action at law the value of the love and affection bestowed upon a daughter who happened to have a separate estate. The contract, however, was entered into, and by it the infant admitted a consideration. Is such an admission by the infant any evidence of the fact? We think not. Suppose that in a certain contract made by an infant, it was recited that the indebtedness, the payment of which was therein provided for, was for necessities for such infant. In an action brought to enforce the performance of such contract, after the infant has become of age, does the plaintiff make *prima facie* proof of his right to recover by simply putting the contract in evidence, after proving its execution by such defendant? In the case at bar the only proof of consideration is the recital in the contract. If such recital is *prima facie* proof of the fact, then in that regard an admission made by an infant is quite as valuable as if made by an adult. In other words, a baby may say over his or her signature, "I admit having received from A \$1,000, and in consideration of the same I agree to pay A after I become of age, \$10 per month until the whole sum is paid." After becoming of age and even after having paid the amount specified for several months thereafter, may not such infant insist that it is incumbent on the plaintiff to prove consideration, independent of his admission? If not, as before suggested, an admission as to consideration made by an infant in a contract executed by him has the same force and effect as if made by an adult. We think such admission of consideration contained in an infant's contract is not *prima facie* proof of the fact. (*Sims v. Everhardt*, 102 U. S. 300, 313; *MacGreal v. Taylor*, 167 id. 688, 697; *Lowell v. Daniels*, 2 Gray, 161; *Brown v. McCune*, 5 Sandf. 224; *Murphy v. Holmes*, 87 App. Div. 366.)

In the *Sims Case* (*supra*) Mr. Justice STRONG, in delivering the

opinion for the court, said: "The question is, whether acts and declarations of an infant during infancy can estop him from asserting the invalidity of his deed after he has attained his majority. In regard to this there can be no doubt, founded either upon reason or authority. Without spending time to look at the reason, the authorities are all one way. An estoppel *in pais* is not applicable to infants, and a fraudulent representation of capacity cannot be an equivalent for actual capacity. (*Brown v. McCune*, 5 Sandf. 224; *Keen v. Coleman*, 39 Penn. St. 299.) A conveyance by an infant is an assertion of his right to convey. A contemporaneous declaration of his right or of his age adds nothing to what is implied in his deed. An assertion of an estoppel against him is but a claim that he has assented or contracted. But he can no more do that effectively than he can make the contract alleged to be confirmed."

We conclude that the recital or admission of consideration in the infant's contract furnished no proof of the fact, and that independent of such admission there is absolutely no proof of consideration, and, therefore, that the testatrix or her representative was at liberty at any time to assert its invalidity.

Was the contract ratified by defendant's testatrix after she reached the age of twenty-one years? We assume it is the law that such an alleged ratification, in order to be effective as such, must be "either by an express new promise, made orally or in writing, or it may be implied from acts or declarations clearly showing an intention to recognize the contract, and to be bound by it. The new promise, whether in writing or oral, or evidenced by conduct, must be clear and unequivocal, and must show an intention to be bound." (Clark Cont. [1894] 248.)

Parsons in his work on Contracts (Vol. 1 [8th ed.], p. 349) states the rule to be: "It (ratification) must be made with the deliberate purpose of assuming a liability from which he knows that he is discharged by law."

A mere acknowledgment by an infant after he obtains his majority is not enough. (*Jackson v. Carpenter*, 11 Johns. 542.)

In *Tucker v. Moreland* (10 Pet. 58, 75) the court said: "The mere recognition of the fact that a conveyance has been made is not *per se* proof or a confirmation of it. \* \* \* Admitting that acts *in pais* may amount to a confirmation of a deed, still we are

App. Div.]

Fourth Department, March, 1906.

of the opinion that these acts should be of such a solemn and unequivocal nature as to establish a clear intention to confirm the deed, after a full knowledge that it was voidable."

As we have seen, the contract in question was executed on the 18th day of December, 1890, seven days after the marriage of defendant's testatrix, who was then eighteen years of age, and immediately thereafter she went to England with her husband, where she resided with him until her death in February, 1902. It appears that the husband had property of his own; that the income from his wife's property went into his bank account, no separation or discrimination as to his or hers being attempted. He received and deposited with his own, her income, and all was used for the needs or pleasure of both, as either desired or deemed proper. The contract which is the subject of dispute, by its terms obligated defendant's testatrix to pay \$1,800 per year in equal quarterly payments to the plaintiff during her natural life. The husband guaranteed such payment during the life of his wife. Such payments were made by him or by his direction regularly until his wife's death, and it is solely because of the payments so made that a ratification of the contract is claimed to have been established. If there had been no obligation resting upon the husband in the premises, such payments having been made by or authorized by him, he having charge of his wife's income, there would be force in the suggestion that they were made pursuant to her request and direction, but he by the terms of the contract had obligated himself to pay during the natural life of his wife. How then can it be said that after his wife became twenty-one years of age such payments were made in ratification of her alleged legal obligation, rather than in discharge of his own as guarantor? Indeed, it appears without contradiction that the wife had frequently stated that she did not understand the contract in question imposed any legal obligation upon her. But in addition it appears that immediately upon reaching her majority she made a will which created a trust in plaintiff's favor, which would yield to the plaintiff annually during her natural life precisely the amount specified in the contract. Can we say it was the intention of defendant's testatrix to bestow, upon the plaintiff an annuity of \$3,600 instead of \$1,800 specified in the contract and will? We think the evidence conclusively shows that any

payments which were made in apparent recognition or affirmance of the contract in question, should not be considered as a ratification by the infant, but that at the most they were made or authorized by the husband in discharge of his obligation.

The case at bar presents the not unusual situation of a person seeking to acquire a portion of a decedent's property without consideration and because of words written or alleged to have been spoken. In this case the defendant's testatrix sought to provide for the plaintiff, her loved companion, in effect her mother, by giving her annually \$1,800 during her natural life. It is now sought to make the estate of the deceased contribute to such support the sum of \$3,600 per annum, because we must assume the will of the testatrix which was put in evidence and which, entirely independent of the contract, provided for the payment to the plaintiff of an annuity of \$1,800, is in all respects valid. We think all the acts done by defendant's testatrix after she became twenty-one years of age are consistent with the proposition that she felt a daughter's love and affection for the plaintiff; that such feeling impelled her to make provision for her friend, practically her mother; but that there was no intention on her part to impose an obligation upon her estate of \$3,600 per annum in favor of the plaintiff. Can it be conceived upon the evidence that defendant's testatrix by permitting her husband to pay annually the amount specified in the contract, which he was legally obligated to pay, thereby intended to obligate her estate to annually pay such sum during the natural life of the plaintiff in addition to the payment of a like sum provided for by her will?

The facts as to ratification are that the testatrix's husband, who had charge of the income of her estate and who was jointly obligated with her to make the payments specified in the contract, made or authorized such payments to be made after his wife became twenty-one years of age the same as before and until her death. We think there is no evidence which tends to show that the defendant's testatrix ever in fact did or intended to ratify the contract in question. All the evidence in the record shows most conclusively that she intended only to provide for her friend, practically her mother, a life annuity of \$1,800. We think there is no evidence which tends to support the proposition that the testatrix intended



App. Div.]

Fourth Department, March, 1906.

the plaintiff should have out of her property after her death an annuity of \$3,600, instead of the \$1,800 which had regularly been paid to her during the lifetime of the defendant's testatrix. There ought to be no misunderstanding as to the facts. Defendant's testatrix when eighteen years of age agreed without any consideration therefor to pay to the plaintiff a life annuity of \$1,800. The husband of the testatrix guaranteed such payment during the lifetime of his wife. After her marriage the annuity was paid by the husband or by his direction until his wife's death. She by her will having provided for the payment of the same annuity to the plaintiff, upon her death the payments under the contract ceased, but the same payments were continued under the provisions of the will. By the judgment appealed from such obligation is sought to be enforced, notwithstanding the provision of the will, upon the ground that defendant's testatrix ratified the contract executed by her after she became of age. We think the evidence wholly fails to support such contention.

The conclusion is reached that as matter of law there is not shown to have been any legal consideration to support the contract in question, and that the finding of the learned trial judge that such contract was ratified by defendant's testatrix after reaching the age of twenty-one years, was contrary to and against the weight of the evidence.

It follows that the judgment appealed from should be reversed upon questions of law and of fact, and that a new trial should be granted, with costs to the appellant to abide event.

NASH, J., concurred.

Judgment affirmed, with costs.

ANNA T. GILLIAM, Appellant, v. GUARANTY TRUST COMPANY OF NEW YORK, as Trustee, Appointed in the Place of ANDREW FINDLAY, Deceased, to Care For and Manage the Fund Arising under and by Virtue of the Provisions of a Certain Deed Made by Eliza Hunt to Andrew Findlay, Trustee, Dated April Twenty-seventh, Eighteen Hundred and Fifty-three, and Recorded in the Register's Office, Westchester County, August Thirty-first, Eighteen Hundred and Fifty-nine, in Liber Four Hundred Seventeen of Deeds, at Page Four, Defendant, Impleaded with JAMES S. DYETT and Others, Respondents.

First Department, March 9, 1906

**Trust deed with remainders to heirs of beneficiary — when heirs to be ascertained at death of beneficiary — adoption — when adopted child is heir and takes trust estate to exclusion of brothers of beneficiary.**

When a deed of trust provides that after the death of the beneficiary the corpus of the estate shall go "to her heirs at law," such heirs are to be ascertained, not at the date of the instrument, but at the death of *cestui que trust*. Although brothers of such *cestui que trust*, who was unmarried at the date of the instrument, may be her heirs at the time of her death, their rights are subject to be divested if at the death of said *cestui que trust* she leaves other heirs entitled to take in preference to said brothers under the Statute of Descent as existing at her death.

So, too, the rights of such brothers as remaindermen are subject to be divested if the *cestui que trust* leave her surviving a lawfully adopted child entitled to inherit by statute at the date of her decease.

The right of inheritance is wholly a creation of the statute, and the statutes giving the right of inheritance to an adopted child are in effect a part of the same statute under which said brothers claim.

Hence, although such deed of trust was executed in 1853, at a time when brothers of the *cestui que trust* were living and when no statute allowing adoption or providing for inheritance by an adopted child was extant, nevertheless a child adopted by the *cestui que trust*, who survives her, and who, under the Laws of 1873, chapter 830, and by virtue of subsequent statutes, is entitled to inherit from the foster parent, is her heir to the exclusion of said brothers and is entitled to the trust estate.

Legislation on adoption stated.

PATTERSON and LAUGHLIN, JJ., dissented, with opinion.

APPEAL by the plaintiff, Anna T. Gilliam, from a final judgment of the Supreme Court in favor of the defendants James S. Dyett and others, entered in the office of the clerk of the county of New

App. Div.]

First Department, March, 1906.

York on the 29th day of June, 1905, dismissing the plaintiff's complaint, pursuant to an interlocutory judgment entered in said clerk's office on the 13th day of June, 1905, upon the decision of the court rendered after a trial at the New York Special Term, sustaining the said defendants' demurrer to the complaint, with notice of an intention to bring up for review upon such appeal the aforesaid interlocutory judgment.

*John R. Abney* [*John M. Harrington* with him on the brief],  
for the appellant.

*John D. Henderson*, for the respondents Dyett.

CLARKE, J. :

On April 27, 1853, Eliza Hunt conveyed certain real property to Andrew Findlay "in trust for the use and benefit of \* \* \* Frances J. Dyett during her natural life and after her decease to her heirs at law" by deed which empowered said trustee to sell the land so conveyed, and reinvest the money received in other securities; and provided that "if a sale should be made of said lands, the money or proceeds of said sale shall, until reinvested again be considered as land and held in trust for the benefit of said Frances during her life and after her decease to her heirs at law." Said Findlay died in 1892, and the defendant Guaranty Trust Company of New York was appointed substituted trustee. Frances J. Dyett, the beneficiary under said trust deed, intermarried with Francis H. Thomas. Mr. Thomas died in 1888. Mrs. Thomas died on February 24, 1905. She left her surviving no issue and no descendant. Upon her death the trust created by said deed ceased. On December 6, 1883, under and in pursuance of the provisions of chapter 830 of the Laws of 1873, Mr. and Mrs. Thomas duly adopted plaintiff, then an infant, as and for their own lawful child, and an order in that regard was duly made at chambers of the County Court of Oneida county, and from and after said day Mr. and Mrs. Thomas, until their respective deaths, and the plaintiff sustained toward each other the mutually acknowledged relation of parent and child. The defendants James S. Dyett, Thomas H. Dyett and George H. Dyett are surviving brothers of said Frances J. Thomas, deceased. The question in the case is, the trust having ceased by the death of the life beneficiary,

did the estate upon her death, under the terms of the deed, devolve upon her legally adopted child, the plaintiff, or upon her three living brothers? At the time of her death, under the terms of said deed, who were her "heirs at law?" The plaintiff claims that the deed should be construed as of the time when the trust determined by the death of the life beneficiary; and that as at that time she was entitled to inherit the estate of her adopted mother, she was her heir at law. The defendants claim that the deed should be construed as of the time when the deed was executed and delivered; and that as at that time the law did not authorize the adoption of children they are the sole heirs at law of their sister and entitled to take the whole estate.

Twenty years after the execution of the deed chapter 830 of the Laws of 1873, entitled "An act to legalize the adoption of minor children by adult persons" was passed, providing in section 10 thereof that the adopting parent and the adopted child should sustain toward each other the legal relation of parent and child and have all the rights of that relation excepting the right of inheritance, except that as respects the passing and limitations over of real and personal property under and by deeds, conveyances, wills, devises, and trusts, said child adopted shall not be deemed to sustain the legal relation of child to the person so adopting. Ten years thereafter, December 6, 1883, the plaintiff was lawfully adopted. Section 10 of chapter 830 of the Laws of 1873 was amended by chapter 703 of the Laws of 1887 by providing that the adopting parent and the adopted child should sustain toward each other the legal relation of parent and child, and have all the rights of that relation, including the right of inheritance, except that as respects the passing and limitation over of real and personal property, under and by deeds, conveyances, wills, devises and trusts, dependent upon the person adopting dying without heirs, said adopted child shall not be deemed to sustain the legal relation of child to the person so adopting so as to defeat the rights of remaindermen.

The exception does not apply to the case at bar. The defendants Dyett do not claim as remaindermen under a deed providing for the passing and limitation over of real property, dependent upon the person adopting dying without heirs. They claim under the deed which provides for the passing of the estate to the heirs at law

App. Div.]

First Department, March, 1906.

and that they are such heirs. Chapter 272 of the Laws of 1896 (the Domestic Relations Law) provides in section 60 that "Nothing in this article\* in regard to an adopted child inheriting from the foster parent applies to any will, devise or trust made or created before June twenty-fifth, eighteen hundred and seventy-three, or alters, changes or interferes with such will, devise or trust, and as to any such will, devise or trust, a child adopted before that date is not an heir so as to alter estates or trusts or devises in wills so made or created."

It seems sufficient to say that neither a will nor a devise is here under consideration. Nor is a trust. The trust has run its appointed course unaffected and untouched. That it has ceased and determined is the very reason for this litigation. Further, this child was not adopted before June 25, 1873.

Chapter 408 of the Laws of 1897, amending section 64 of the Domestic Relations Law, provides that "The foster parent or parents and the minor sustain toward each other the legal relation of parent and child, and have all the rights and are subject to all the duties of that relation, including the right of inheritance from each other, \* \* \* and such right of inheritance extends to the heirs and next of kin of the minor, and such heirs and next of kin shall be the same as if he were the legitimate child of the person adopting, but as respects the passing and limitation over of real or personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the minor is not deemed the child of the foster parent so as to defeat the rights of the remaindermen." Section 60 of the Domestic Relations Law (Laws of 1896, chap. 272) also provides that "Proof of the lawful adoption of a minor heretofore made may be received in evidence, and any such adoption shall not be abrogated by the enactment of this chapter and shall have the effect of an adoption hereunder."

The defendants concede that under these various provisions the plaintiff would be entitled to take by inheritance or succession the estate of her foster mother; that so far as there may be accumulation of income from the trust estate, that she is entitled to. They insist, however, that this estate is not the estate of Mrs. Thomas, devolving by inheritance, but the estate of Eliza Hunt, transmitted

---

\* Dom. Rel. Law, art. 6.—[REP.]

by deed which is to be interpreted as of the time of execution. Their contention is stated as follows: "By the terms of the deed of Eliza Hunt \* \* \* the then heirs at law of the *cestui que trust* took a vested remainder in the said trust estate, and her father being dead, her three brothers, the defendants Dyett, were then such heirs at law, liable, however, to be divested by the birth of a child." There is nothing in this record to show that at the time of the making of the deed the father of the *cestui que trust* was dead, or that the defendants were then her heirs at law. The Statute of Descent (1 R. S. 751, § 1; R. S. pt. 2, chap. 2, § 1) at that time provided that "the real estate of every person who shall die without devising the same, shall descend in manner following: 1. To his lineal descendants: 2. To his father: 3. To his mother: and 4. To his collateral relatives: Subject in all cases to the rules and regulations hereinafter prescribed." And then follow many rules governing various contingencies and varying degrees of consanguinity. The *cestui que trust* was at that time an unmarried girl. Her heirs could only be known at the time of her death, which as matter of fact occurred fifty-two years thereafter. If we look at the nature of the instrument and the situation of the parties, if we look at the intention, can it be doubted, in view of all the possible contingencies that might arise, that the grantor, when she used the words "after her decease to her heirs at law," had in mind the obvious, natural meaning, viz., those persons who at the time of her death should be declared by the law then existing to be her heirs at law? There can be no heirs of a living person. "The legal and well understood meaning of the word heir, is, the one upon whom is cast an estate of inheritance upon the death of the owner, and it follows that this person is uncertain until death occurs, for until that event, it can never be known to whom the estate will fall." (*Heath v. Hewitt*, 127 N. Y. 171.) If we assume, what does not appear, that at the time of the execution of this deed these three defendants would have been the heirs of the *cestui que trust* if her death had presently occurred, their right to take upon that event was undoubtedly subject to be divested by her marriage and the birth of a child. The share of each one was liable to be divested by his death before the *cestui que trust*. Consequently their whole estate — whatever it was — was liable to be divested by the death of all three before

App. Div.]

First Department, March, 1906.

Frances Dyett's death. That such an estate is not devisable, descendible or alienable is settled. In *Dougherty v. Thompson* (167 N. Y. 487) Judge LANDON said: "*Moore v. Littel* (41 N. Y. 66) is a leading authority, although it has been criticised upon common-law lines. It is to the effect that a remainder limited to the heirs of A upon the determination of a life estate in A is vested in his lifetime in his living children, although — and this is the point of the criticism — A's heirs cannot be ascertained until his death. But the case also holds that the death of any child in his father's lifetime defeats his interest and divests the remainder, the effect of the statute being to abolish the common-law condition precedent to the vesting of the remainder, namely, the child's survivorship of his father, and to substitute for it a condition subsequent, which may divest and defeat the remainder after it is vested, namely, the child's death in his father's lifetime.

"It was held in subsequent cases founded upon the same title that the deed of a child who predeceased his father conveyed no part of the remainder. (*Jackson v. Littell*, 56 N. Y. 108; *House v. McCormick*, 57 ib. 310; *House v. Jackson*, 50 ib. 161.) Thus a remainder vests subject to be divested, if such is its tenure, and the condition subsequently occurring upon which the divesting depends, the remainder is thereby divested."

Said Mr. Justice RUMSEY in *Paget v. Melcher* (26 App. Div. 17), said opinion being approved by the Court of Appeals (156 N. Y. 404), "The deed, then, is to be construed in accordance with the rule that where final distribution is to be made among a class, the benefits must be confined to those persons who constitute the class at the time when the division is directed to be made. \* \* \* It is not necessary to consider the precise nature of the interest taken by the members of the class before the time for division arises. Whether the remainder be contingent, or a vested remainder in those persons who shall constitute the class at any given time, subject to be divested by the death of any one of those persons before the time for distribution arises, is a matter of no particular importance. It is sufficient for the purposes of this case to say that the general rule is well established that the property when divided is to go to those persons who shall compose the class at the time when the division is to be made." So that whatever this right of these

defendants may be called, vested, subject to be divested; or contingent, it was liable to be defeated if at the death of the *cestui que trust* they were not then her heirs. Their rights depended upon the Statute of Descent. Under certain contingencies they would be the heirs at law. That right was subject to be destroyed by the birth of lineal descendants who under the same statute would then oust them. That statute was subject to amendment. It must be assumed that the grantor knew the law; and that when she said "after her decease to her heirs at law," she said it knowing that the Legislature had the power to declare who the heirs at law were. The statute was amended by providing that adopted children should inherit; and as this was an amendment, in effect, of the same statute under which defendants claim (*Dodin v. Dodin*, 16 App. Div. 42; *Kemp v. N. Y. Produce Exchange*, 34 id. 175), it seems to me their right was destroyed or divested by the adoption of a child as it would have been by the birth of a child. In the *Kemp Case* (*supra*) Mr. Justice CULLEN said: "On the death of the testator or the delivery of the deed, the rights of the remaindermen would vest, and those rights could not be divested by subsequent legislation. Though even in such case, if the will or deed showed an intent that the distribution should be governed by the laws that might exist at some future time provided for the distribution of the fund, effect would unquestionably be given to it."

In *Kohler's Estate* (199 Penn. St. 455) it appeared that by will dated October 11, 1853, testator gave part of his estate in trust for his son for life, with remainder to "such person or persons as would be entitled thereto if my said son John F. Kohler had survived his wife and died intestate, and possessed thereof and in such shares and proportions as such person or persons would in such case be entitled by law." And the court said: "The learned Judge below very forcibly said: 'The will of John Kohler, father of the *cestui que trust*, was written thirty-six years before the decree of adoption, and that event therefore was not reasonably within the contemplation of the testator. But as he gave the estate to those persons to whom the law would give it in the case of intestacy, he cannot be said to have had any particular class of heirs or next of kin in view, and he committed the question of determining who should take to the law itself.' And it is only necessary to add that a testator who commits



App. Div.]

First Department, March, 1906.

the distribution of his estate to the law, upon the happening of an event necessarily future, must reasonably be presumed to have contemplated the possibility of a change in the law in the meantime."

In *Randall v. Kreiger* (23 Wall. 137), in speaking of dower, the United States Supreme Court said: "It is wholly given by law, and the power that gave it may increase, diminish, or otherwise alter it, or wholly take it away. It is upon the same footing with the expectancy of heirs, apparent or presumptive, before the death of the ancestor. Until that event occurs the law of descent and distribution may be moulded according to the will of the Legislature." In *McGillis v. McGillis* (11 App. Div. 359; 154 N. Y. 532) testator left a life estate to his daughter, and "from and after the decease of \* \* \* my said daughter \* \* \* to the lawful issue of my said daughter then living in such relative proportions \* \* \* as they would by the laws of the State of New York have then inherited \* \* \* in case she \* \* \* had then died intestate." At the time of the death of her father Mrs. McGillis had four children who were aliens. After the death of testator she had four more children who were entitled to take. She died leaving six children, three born before the death of testator and three afterwards and one grandchild. Legislation subsequent to the death of testator permitted the aliens to take. In the Appellate Division Mr. Justice LANDON said: "The argument against the power of the Legislature to qualify the four first-born children of Mrs. McGillis to take the devise of the testator rests upon the assumption that title to the ultimate possession of the remainder absolutely vested either in the heirs of the testator or in the after-born children of Mrs. McGillis. But this argument wholly fails when we see that such vesting was not of the absolute right to the ultimate possession of the remainder, but of a contingent right to it, the contingencies inhering in the right as created by the testator, and only absolutely to be put at rest by the death of Mrs. McGillis. Then those who were within the class designated by the testator became vested of the remainder in possession and until then all the issue of Mrs. McGillis were eligible to enter the class — the after-born by birth within it, the prior-born by the enabling qualification of the statute." In the Court of Appeals Judge HAIGHT said: "The pivotal question in the case arises upon the

construction which should be given to the provisions of the will and is as to whether the remainder after the death of the testator was vested or contingent. \* \* \* All the children of Mrs. McGillis in being at the time of the death of the testator were aliens; they consequently could not take under the will, and there could be no vesting of the remainder in them. If there was any vesting of the remainder, it necessarily must have been in the heirs at law. \* \* \* He not only gives to the issue then living, but he leaves the proportion or share which each is to take to be determined by the laws of the State which shall be in force at the death of his daughter and her husband, providing for its distribution under such laws in the proportion in which it would descend, upon the assumption that his daughter was at that time the owner of the property in fee simple. It was not known at the time of the testator's decease which would survive the other, the daughter or her husband. It was not known and could not then have been ascertained what person or persons would be then living, if any, of the lawful issue. It consequently follows that the person to whom, or the event upon which the estate was limited to take effect, was uncertain, and, therefore, the remainder was contingent. If the remainder were contingent the heirs at law took no interest in the estate upon the death of the testator. It could not, then, be determined who the heirs at law would be or what provisions of the statute would in the meantime be adopted. \* \* \* Upon the death of Mrs. McGillis "the persons who are entitled to take the estate in possession became fixed and certain. In the meantime our statutes had been changed. \* \* \* It in effect amends the provision of the Revised Statutes making void a devise to a person who at the time of the death of the testator shall be an alien, so that the provisions of that statute no longer apply to the foreign-born children of married women born in this country. Under the statute existing at the time of the death of Mrs. McGillis the estate, if it had been hers and she had died intestate, would have descended to her children."

In the recent case of *Richards v. Hartshorne* (110 App. Div. 650) a life estate in trust was devised with remainder over to the Rahway Library Association upon failure of issue of the *cestuis que trustent*. At the time of the death of testatrix, the library association, being a

App. Div.]

First Department, March, 1906.

foreign corporation, was unable to take by devise under our laws. Prior to the death of the life tenant an act was passed by the Legislature permitting such corporation to take and hold for five years. The claim was made that on the death of testatrix her heirs became vested with the remainder, subject to be divested by birth of issue of the life tenants, and that such vested remainder could not be affected by subsequent legislation conferring upon the library the power to take. This court, by the presiding justice, O'BRIEN, said: "The real issue to be determined, therefore, is whether the remainder was vested or contingent. The court at Special Term held that it was the former, but we do not agree with this conclusion," and gave judgment for the library.

There is no difference in principle. The courts have always had in mind the intention of the testator or grantor. The defendants here were not remaindermen by name in the deed. They have none of the attributes of personal selection as ultimate beneficiaries. Grantor looked not to individuals, but to a class "after her decease to her heirs *at law*."

It is conceded, as it must be under the authority of *Dodin v. Dodin* (16 App. Div. 42; *affd.*, 162 N. Y. 635); *Kemp v. N. Y. Produce Exchange* (34 App. Div. 175), and *Theobald v. Smith* (103 *id.* 200), that as to Mrs. Thomas' own estate the plaintiff has the right to inherit. Possession of the right to inherit by law constitutes the possessor of such right the heir at law. As it appears from the foregoing discussion that the words, "after her decease to her heirs at law" — not the heirs at law of the grantor, but of the *cestui que trust* — must be taken to mean the heirs so constituted by law at the decease of the *cestui que trust*, it follows that the plaintiff is such heir at law. The defendants' rights were contingent on their being the heirs at said time. That contingency having failed, the complaint states facts sufficient to constitute a cause of action, the demurrer was improperly sustained and the judgment should be reversed, with costs in this court and in the court below, with leave to the defendants to withdraw the demurrer and plead over within twenty days upon payment of such costs.

O'BRIEN, P. J., and INGRAHAM, J., concurred; PATTERSON and LAUGHLIN, JJ., dissented.

PATTERSON, J. (dissenting):

Accepting the statement of facts as narrated in the prevailing opinion in this cause, I am unable to concur in the conclusion at which the majority of my brethren have arrived that the interlocutory judgment should be reversed.

I think there are vested remainders in the surviving brothers of Mrs. Frances J. Thomas (Dyett), but as that seems to be debatable I prefer to place my dissent upon the ground that the statutes relating to adopted children do not apply to the trust deed made and delivered by Eliza Hunt, the grantor or creator of the trust, in 1853. The terms of that trust are specifically for the use and benefit of Frances J. Thomas (Dyett) during her natural life, and after her decease the trust property to pass to her heirs at law. When the instrument was made and delivered, adoption of children with consequent rights of inheritance in them was unknown to the law of New York. (*Matter of Thorne*, 155 N. Y. 140; *Smith v. Allen*, 161 id. 482.) The first statute relating to adoption was passed in this State in 1873 (Laws of 1873, chap. 830), twenty years after the deed in question was made. Its sole purpose was to establish a mutual relation of parent and child between the person adopting and the one adopted, but rights of inheritance were specifically excluded. Subsequent statutes *in pari materia* will be hereinafter referred to. This plaintiff was adopted in 1883. It seems to me that in construing the trust deed we must have regard to the intention of the testator at the time it was executed and the trust created. The words "heirs at law" at that time had a definite legal meaning. They then meant kindred by blood and no others. They did not relate to a stranger to the blood, family and kindred, made an heir by a legal proceeding which the creator of the trust could never have imagined nor anticipated. "The word 'heir,' in legal understanding, signifies him to whom lands, tenements, or hereditaments, by act of God and right of blood, descend, of some estate of inheritance." (Broom Leg. Max. [6th Am. ed.] 381; 3 Washb. Real Prop. [5th ed.] 6.) "The word 'heirs' is a legal term having a definite meaning, and expresses the relation of persons to a deceased ancestor and not to a living." (*Cushman v. Horton*, 59 N. Y. 151.) "The primary meaning in the law of the word 'heirs' is the persons related to one by blood, who would take his real estate if he

App. Div.]

First Department, March, 1906.

died intestate, and the word 'embraces no one not thus related.' (*Tillman v. Davis*, 95 N. Y. 24.) Such was the meaning of the words in this trust deed when the trust was created, and a testator (and so of a grantor) is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless, from the context of the instrument, it appears that he has used them in a different sense. (*Luce v. Dunham*, 69 N. Y. 39; *Tillman v. Davis*, 95 id. 24; *Murdock v. Ward*, 67 id. 389; *Keteltas v. Keteltas*, 72 id. 312; *Cushman v. Horton*, 59 id. 149.)

If my understanding of the intention of the creator of the trust is correct, then it is evident that she had in contemplation that kindred in blood of the beneficiary — those who would be such at the death of the beneficiary — were to take the interest in remainder after the expiration of the trustee's estate. Upon an examination of the statutes passed after 1873, relating to the subject of the adoption of children, I am of the opinion that the intention of the creator of the trust is not to be thwarted or defeated. It must be conceded that so far as succession to the property, real and personal, of the adopting parent is concerned, the adopted child sustains the relation of heir, and that such relation, with its incidents, is established as of the time of the death of the parent, and not in accordance with the law as it existed at the time of the adoption, so that if at the time of the adoption the statute did not confer the right of inheritance, but did at the time of the death of the parent, the adopted child would take. (*Theobald v. Smith*, 103 App. Div. 200; *Dodin v. Dodin*, 16 id. 45; *affd.*, 162 N. Y. 635.)

We have seen that by the statute of 1873 the right of inheritance was not given to the adopted child. In 1887, by chapter 703 of the laws of that year, the act of 1873 was amended and the relation of parent and child was constituted, including the right of inheritance, except that as respects the passing and limitation over of real or personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the adopted child was not deemed the child of the foster parent so as to defeat the rights of remaindermen. It is a fair construction of this statute that its intent was to give the adopted child rights in property passing under deeds, wills, devises and trusts, except in the particular instance where the passing or limitation over of the property was

dependent upon the person adopting dying without heirs. But in 1896 a change was again made in the law. (Laws of 1896, chap. 272, § 60.) By that section it is provided as follows: "Nothing in this article\* in regard to an adopted child inheriting from the foster parent applies to any will, devise or trust made or created before June twenty-fifth, eighteen hundred and seventy-three, or alters, changes or interferes with such will, devise or trust, and as to any such will, devise or trust, a child adopted before that date is not an heir so as to alter estates or trusts or devises in wills so made or created." The effect of section 60 is, so far as it relates to trusts of property created before June 25, 1873, to put an adopted child back in the same position it would have occupied under the act of 1873, namely, to deny to it the right of inheritance as to such property. I cannot assent to the proposition that section 60 is inapplicable here because the trust ceased at the death of the beneficiary. When the trust ceased whoever was entitled to the remainder would take under the trust deed and would not take from the beneficiary. *Sharmán v. Jackson* (98 App. Div. 187) is authority only for the proposition that the trust ceased on the death of Mrs. Thomas (Dyett). I think one of the purposes of section 60 was to prevent an adopted child as heir of the adopting parent from taking property "so as to alter estates or trusts or devises" made or created prior to June 25, 1873. It seems to me that allowing the plaintiff to take realty, as an heir at law of the beneficiary of the trust, would radically change the provisions of the trust deed if I am right in the interpretation given to the words "heirs at law" in that trust deed as evincing the intention of the grantor at the time the trust was created. I think the statutes of adoption should not be construed so as to defeat the intention of the creator of a trust and divert his property from that line of succession in which he declared it should go and bestow it upon absolute strangers whom he never intended to be the recipients of his bounty.

The judgment should be affirmed, with costs.

LAUGHLIN, J., concurred.

Judgment reversed, with costs, and demurrer sustained, with costs, with leave to defendants to withdraw demurrer and to answer on payment of costs in this court and in the court below.

---

\* Dom. Rel. Law, art. 6.—[REP.]

App. Div.]

First Department, March, 1906.

In the Matter of the Application of GEORGE F. RICKETTS, Appellant, for a Writ of Mandamus, Directed to WILLIAM F. BAKER, as President, and Others, as Commissioners, Composing the Municipal Civil Service Commission of the City of New York, Respondents.

First Department, March 9, 1906.

**Municipal corporations — civil service rule of city of New York requiring six months' service before admission to examination for promotion is constitutional — mandamus to compel admission to such examination before such service refused.**

Rule 15, subdivision 2, adopted by the municipal civil service commission of the city of New York, which provides that those taking examinations for promotion "shall have served with fidelity for not less than six months, in positions of the same group or general character, in the grade next lower, in the same department," is not in violation of section 9 of article 5 of the State Constitution, providing that "promotions \* \* \* shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations," etc. Nor is said rule in violation of the Civil Service Law, which requires that "promotions shall be based upon merit and competition."

Hence, a peremptory writ of mandamus to compel the admission of an assistant foreman of the fire department of said city to an examination for promotion before he has served six months in his present grade will be refused.

APPEAL by the petitioner, George F. Ricketts, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 25th day of January, 1906, denying the petitioner's motion for a peremptory writ of mandamus.

*Weed, Henry & Meyers* [*Richmond Weed* of counsel], for the appellant.

*William B. Crowell* [*Theodore Connolly* with him on the brief] and *John J. Delany, Corporation Counsel*, for the respondents.

CLARKE, J. :

The appellant is an assistant foreman in the fire department of the city of New York. He applied to the Special Term of the Supreme Court for a writ of mandamus directed to the commissioners composing the municipal civil service commission of the

city of New York, requiring them forthwith to permit him to enter and take part in a certain examination for promotion to the office of foreman in the fire department of said city, held by said commission on or about the 6th day of December, 1905, to examine him for said office and to rate his merit and fitness for promotion to said office pursuant to law, and to certify his name, if he be found eligible for such promotion, to the fire commissioner of said city in his appropriate place upon the eligible list made up as a result of said examination. The appellant alleged in his petition that he had been duly appointed to the position of fireman February 1, 1896, and became prior to January 1, 1899, a fireman of the first grade, and on July 19, 1905, was duly promoted, pursuant to due examination and certification under the Civil Service Law and rules to the position of assistant foreman. He alleges that upon application made by the fire commissioner, the civil service commission in the month of October, 1905, called an examination for the purpose of examining candidates for promotion to the position of foreman in the fire department, and that numerous persons eligible to be examined were notified of the time and place of such examination; that the municipal civil service commission has declined to recognize petitioner's rights to be examined or to permit him to enter the examination upon the ground that he has not served for six months in the position of assistant foreman, as required by rule 15, subdivision 2, of the rules of the municipal civil service commission, adopted and promulgated December 4, 1903, which provides that "examination for promotion shall be ordered as often as may be necessary to meet or to anticipate the needs of the higher grades, and so far as practicable shall be held periodically. Except where otherwise provided by law, such examinations shall be open, in each case, to all persons who shall have served with fidelity for not less than six months, in positions of the same group or general character, in the grade next lower, in the same department, office or institution." Subdivision 5 of said rule also provides that "no person shall be admitted to an examination for promotion who lacks any preliminary qualification for the position to be filled, fixed by law, or by these rules \* \* \*."

The petitioner further alleged that the requirements of said rule 15, subdivision 2, that said promotion examination shall be open



App. Div.]

First Department, March, 1906.

only to persons who shall have served with fidelity for not less than six months in positions in the grade next lower, in the same department, is invalid, and that other rules *in pari materia* in regard to rating are invalid and "deprive your petitioner of his right to compete in said examination for promotion to the office of foreman, and greatly prejudice him in his occupation and in his standing in the public service of the City of New York, and that they unlawfully restrict the competition for promotion to such position, and that they are arbitrary and unreasonable and of no effect."

The Special Term denied the writ, and the petitioner appeals. Appellant claims that the civil service commission had no power to establish the rule in question; that it is invalid and unconstitutional, in that it unlawfully restricts competition for promotion.

Section 9 of article 5 of the State Constitution provides that "appointments and promotions in the civil service of the State and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive \* \* \*. Laws shall be made to provide for the enforcement of this section." The existing Civil Service Law, passed in obedience to that mandate of the Constitution, is chapter 370 of the Laws of 1899. Section 10 of said act (as amd. by Laws of 1900, chap. 675) provides that "The mayor of each city in this State shall appoint and employ suitable persons to prescribe, amend and enforce rules for the classification of the offices, places and employments in the classified service of such city, and for appointments and promotions therein and examinations therefor \* \* \*, not inconsistent with the Constitution and the provisions of this act, and shall amend the same from time to time. \* \* \* Such rules herein prescribed and established \* \* \* shall be valid and take or continue in effect only upon the approval of the mayor of the city and of the State civil service commission. \* \* \* Subject to the provisions of this act and of said rules, the municipal commission of any city shall make regulations for and have control of examinations and registrations for the service of such city and shall supervise and preserve the records of the same." Section 6 of said act provides that "the rules prescribed by the State and municipal commissions pursuant to the provisions of this act shall have the

force and effect of law." Section 15 thereof provides that "Vacancies in positions in the competitive class shall be filled, so far as practicable, by promotion from among persons holding positions in a lower grade in the department, office or institution in which the vacancy exists. Promotions shall be based upon merit and competition and upon the superior qualifications of the person promoted as shown by his previous service, due weight being given to seniority."

It thus appears that upon the commission is conferred the power to establish rules and regulations not inconsistent with the Constitution and the provisions of said act, which rules and regulations, upon approval by the mayor and the State Civil Service Commission, have the force and effect of law. The rule providing for six months' service in the next lower grade does not offend any constitutional provision. The appellant claims that because section 9 of article 5 of the Constitution provides that "promotions \* \* \* shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive," it is a violation of the principle of competitive examination to require a period of service in the next lower grade before promotion. I find no such limitation in the Constitution. The reiteration of the words "so far as practicable," establishes the fact that the constitutional convention and the people who approved its work were distinctly aware that competitive examinations were not always practicable, and that the results thereof would not always produce the best results in the public service. The Constitution, therefore, instead of a hard and fast rule, left some leeway. Especially is it true in regard to promotions that much more than mere proficiency in paper examination is requisite for the determination of efficiency. Above all, in what might be called those quasi-military bodies, the police and fire departments, where discipline in the rank and file and effectiveness in fighting crime and fire depend so much upon the coolness, skill, steadiness, experience and qualities of command in the superior officers. So the Constitution provided that, so far as practicable, examinations should be had, and, so far as practicable, be competitive, and directed the Legislature to provide for the enforcement of the section.

The appellant claims the rule to be a violation of the Civil Service

App. Div.]

First Department, March, 1906.

Law, because, he says, section 15 of that act says "promotions shall be based upon merit and competition," and that the commission has no right to restrict competition by any period of service in the lower grade. But the same section of the act says, "*and* upon the superior qualifications of the person promoted, as shown by his previous service, due weight being given to seniority." Section 728 of the Greater New York charter (Laws of 1901, chap. 466) also provides: "Promotions of officers and members of the force shall be made by the fire commissioner as provided in section one hundred and twenty-four of this act on the basis of seniority, meritorious service in the department and superior capacity as shown by competitive examinations." So far from establishing appellant's point, those provisions seem to me to be warrant for the rule. We are dealing with promotion from one grade to another, from a subordinate to a position of command. What better test of ability to command can be given than by service as second in command? How are "seniority" and "meritorious service" in the grade below, and the "superior qualifications of the person promoted as shown by his previous service," to be ascertained and given their due weight, if there has been no service in the lower grade? For entrance into the service—and the provisions as to competitive examination are the same in both Constitution and law—the rules provide certain preliminary qualifications, as, for instance, height and weight and age. These qualifications are not prescribed in the statute, but are wisely left to the commission, the law providing in section 13 of the Civil Service Law, "Such commissions may refuse to examine an applicant, or after examination, to certify an eligible, who is found to lack any of the established preliminary requirements for the examination or position for which he applies."

The law, therefore, contemplates the establishment by rule of "preliminary requirements." For a promotion, six months' service in the inferior grade is such a preliminary requirement. The commission has the power to make such requirement. The question for the court is: Was the rule reasonable, designed to carry out the purpose of the law and not to defeat it? We think this rule to be reasonable and proper, designed to promote the efficiency of the

service and in harmony with the spirit of the civil service provisions of the Constitution and laws made thereunder. The court has the power to review such a rule and to declare it invalid if it does offend such spirit and purpose, and it will not hesitate, in a proper case, to exercise such power.

In the case at bar the decision of the court below was right, and the order appealed from should be affirmed, with ten dollars costs and disbursements.

O'BRIEN, P. J., INGRAHAM, McLAUGHLIN and HOUGHTON, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements. Order filed.

---

JACOB J. GOLDMAN and MICHAEL GOLDMAN, Respondents, v. HENRY CORN, Appellant, Impleaded with CHARLES DEITSCH and EDWARD J. DEITSCH, Defendants.

First Department, March 9, 1906.

**Injunction pendente lite — when assignee of lease entitled to injunction to restrain landlord from interfering with his possession — complaint insufficient which fails to allege facts showing remedy at law is inadequate — affidavits insufficient.**

The assignee of a lease not containing restrictions against assignment may have an injunction *pendente lite* under section 603 of the Code of Civil Procedure to restrain the landlord from excluding such assignee from the premises if the complaint sets out facts showing that the remedy at law is not adequate.

But, as ordinarily a tenant's remedy at law is adequate, a complaint praying for such injunction is not sufficient to warrant the granting of the same when it does not set out facts showing the inadequacy of the remedy at law. A mere allegation that plaintiff will sustain irreparable damage and has no adequate remedy at law is insufficient.

Accompanying affidavits are not sufficient to show said facts, as under section 603 of the Code of Civil Procedure the right to the injunction in such action must appear upon the face of the complaint.

APPEAL by the defendant, Henry Corn, from an order of the Supreme Court, made at the New York Special Term and entered

App. Div.]

First Department, March, 1906.

in the office of the clerk of the county of New York on the 15th day of December, 1905, granting an injunction *pendente lite*.

*George Hahn*, for the appellant.

*Brussel & Beebe* [*B. F. Einstein* of counsel], for the respondents.

CLARKE, J.:

This is an appeal by the defendant Corn from an order enjoining him from in any manner interfering with or preventing the plaintiffs from taking possession of and occupying the tenth loft or eleventh floor of the premises 110 and 112 Fifth avenue in the city of New York. The complaint alleges that on or about October 14, 1903, the defendants Deitsch and the defendant Corn entered into a lease whereby Corn leased the tenth loft of the building 110 and 112 Fifth avenue to the Deitschs for five years, commencing February 1, 1904; that the lease provided for a renewal for a further period of five years, at the option of defendants Deitsch; that said defendants entered into possession and duly performed all the covenants on their part to be performed; that on the 31st of August, 1905, the plaintiffs made an agreement in writing with the defendants Deitsch, whereby the defendants Deitsch leased to the plaintiffs the demised premises for the term of eight years, commencing February 1, 1906; that on the 29th of November, 1905, the plaintiffs entered into a further agreement with the defendants Deitsch, whereby said defendants gave to the plaintiffs the right to immediately enter into possession of and to occupy said demised premises; that the defendant Corn has refused, and still refuses, to permit the plaintiffs to enter into possession of and to occupy the said demised premises, and has wrongfully excluded, and continues to unlawfully exclude, the plaintiffs from the same; that by reason of the matters aforesaid the plaintiffs will sustain irreparable loss and damage; that these plaintiffs have no adequate or sufficient remedy at law for the protection of their rights in the premises.

This complaint is framed in equity as a case where the right to an injunction depends upon the nature of the action, and if the facts set up would entitle the plaintiffs to a judgment for such relief, then the issuance of an injunction *pendente lite* is authorized by section 603 of the Code of Civil Procedure.

The basis of plaintiffs' claim is that Corn has prevented them from taking possession of the demised premises under an agreement made by plaintiffs, not with Corn, but with the Deitschs. If the Deitschs are unable to give them possession of the premises, undoubtedly plaintiffs would have an action against the Deitschs for damages for breach of contract, and the Deitschs would have an action for damages against Corn for breach of the lease with them, inasmuch as there is no restriction against their subleasing. But I do not understand that ordinarily an action in equity lies to enforce the right of possession under a lease. The damages are clearly ascertainable and may be enforced in an action at law. The plaintiffs seem to have been of this opinion, for they have alleged "that by reason of the matters aforesaid the plaintiffs will sustain irreparable loss and damage," and they have set up in their affidavits facts and circumstances which, if alleged in the complaint, might have been sufficient to entitle them to the remedy therein demanded, and so warrant the order here appealed from. But the complaint contains no such matter.

In *Heine v. Rohner* (29 App. Div. 242) Presiding Justice VAN BRUNT said: "It is to be observed that the question of the right to an injunction of this character depends upon the allegations of the complaint, and that unless it appears from the complaint that the plaintiff is entitled to the judgment of injunction, it cannot issue. (Code Civ. Proc. § 603.) It may all be very true that evidence may be offered in the shape of affidavits to support the allegations of the complaint, but where the complaint itself shows no cause of action or right to relief, such right cannot be established by affidavit."

In *McHenry v. Jewett* (90 N. Y. 58) Chief Judge ANDREWS said: "The mere allegation of serious or irreparable injury apprehended or threatened, not supported by facts or circumstances tending to justify it, is clearly insufficient. Neither injury to the plaintiff's property, inadequacy of the legal remedy, or any pressing or serious emergency, or danger of loss, or other special ground of jurisdiction is shown by the complaint. The complaint, therefore, does not show that the plaintiff is entitled to final relief by injunction. \* \* \* It is doubtless sufficient that a probable or *prima facie* case be made to justify the granting of an injunction

App. Div.]

First Department, March, 1906.

*pendente lite*, but where, as in this case, it clearly appears that the complaint shows no cause of action, then a preliminary injunction is unauthorized and the granting of it is error of law which may be reviewed by this court on appeal."

In *Brass v. Rathbone* (153 N. Y. 435) it was said: "The only allegation in their complaint, however, is that the discontinuance of the supply of water to their premises would work a great hardship to the tenant and produce great and irreparable injury to the plaintiffs. But no facts are stated in the complaint justifying that conclusion. The mere allegation of great or irreparable injury apprehended or threatened which is not supported by facts or circumstances tending to justify it is clearly insufficient. Therefore, the complaint does not show that the plaintiffs were entitled to relief by injunction."

It follows that the complaint in this case not setting up facts sufficient to warrant the final judgment of injunction, it was error to grant the injunction *pendente lite*.

Order reversed, with ten dollars costs and disbursements, and injunction vacated, with ten dollars costs.

INGRAHAM, J., concurred.

O'BRIEN, P. J. (concurring):

I concur in the conclusion reached by Mr. Justice CLARKE, and for the following reasons:

He states that plaintiff "has set up in his affidavits facts and circumstances which, if alleged in the complaint, *might* have been sufficient to entitle him to the remedy therein demanded, and so warrant the order here appealed from. But the complaint contains no such matter." I agree that this latter statement is correct, but I am of opinion that if the facts and circumstances stated in the affidavits had been included in the complaint the plaintiffs would have been entitled to an injunction *pendente lite*. The law is well settled that "the landlord has no right upon his tenant's premises during the term, without the tenant's consent, unless such right of entry is reserved in the letting. Every unlawful entry upon the premises of another is a trespass, and, whether the owner suffer much or little, he is entitled to recover some damages." (*Shannon v. Burr*, 1 Hilt. 40.)

The Deitschs under their original lease had been in possession

from October, 1903, until August 31, 1905, and having the right to assign the lease to the plaintiffs, the landlord, Corn, had no more legal right than a stranger to interfere with plaintiffs going into possession. For such an unlawful interference with the plaintiffs' rights they would ordinarily have an adequate remedy at law for damages. And that a tenant also has the right to enjoin a trespass is also abundantly supported by authority. (*Doyle v. Lord*, 64 N. Y. 432.) In the latter case it must appear that mere damages are not an adequate remedy.

The learned judge at Special Term, upon the question whether the plaintiffs have an adequate remedy at law, says: "It sufficiently appears that the busy season of plaintiffs is at hand; that they are in danger of losing trade if they are not permitted to take possession, and in my judgment, sufficient of a *prima facie* case is presented showing that they would have no adequate remedy at law." The facts, however, upon which this is made evident are not stated in the complaint, but appear in affidavits which were used upon the motion. I agree, therefore, with Mr. Justice CLARKE, that as the right to injunctive relief in this instance depends upon the nature of the action, and is thus controlled by section 603 of the Code of Civil Procedure, the three cases which he cites (*Heine v. Rohner*, 29 App. Div. 242; *McHenry v. Jewett*, 90 N. Y. 58; *Brass v. Ruthbone*, 153 id. 435) are authorities for the proposition that the facts must be alleged in the complaint showing that the plaintiffs are entitled to injunctive relief, and that such right cannot be established by affidavits.

I think, therefore, that the order must be reversed, but without prejudice to a renewal of the application should the plaintiffs be successful in obtaining leave to serve an amended complaint with suitable allegations which support their right to injunctive relief.

LAUGHLIN and HOUGHTON, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs, without prejudice to a renewal as stated in opinion. Order filed.



JOHN T. WILLIAMS, Respondent, v. ROBERT M. SILVERMAN REALTY  
AND CONSTRUCTION COMPANY, Appellant.

First Department, March 9, 1906.

**Injunction—landowner restrained from encroaching on street by windows and portico—restrictive covenant by landowners to set back building line—municipal corporations—municipal authorities of city of New York without power to license permanent encroachments on public streets.**

Although the title to the streets in the city of New York is in the municipality it is held in trust for public use, and the board of aldermen and the park commissioners of said city have no power to grant licenses to private landowners to encroach upon the street line by bay windows, etc.

Hence, when the predecessors in title of adjoining owners have entered into a restrictive covenant or "set-back agreement" as to lands facing a park, which covenant by its terms runs with the land, and which provides that said owners shall forever keep the sidewalks on their land unincumbered, and that the building line shall be set back ten feet from the line laid out by the municipality, and that no owner shall build any structure other than such as is permitted by the law to be built between what is known as the exterior house line and the exterior area or stoop line, etc., an owner will be restrained *pendente lite* from erecting bay windows and a portico extending three feet out from said set-back line, although a license therefor has been obtained from the municipal authorities.

But the removal of portions of such encroaching structures already built should not be compelled by temporary injunction, but should be left for the final decree.

PATTERSON, J., dissented.

APPEAL by the defendant, the Robert M. Silverman Realty and Construction Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 14th day of December, 1905, granting an injunction *pendente lite*.

*John W. Weed* [*Charles Meyers* with him on the brief], and *Weed, Henry & Meyers*, for the appellant.

*Richard T. Greene*, for the respondent.

CLARKE, J. :

The plaintiff and defendant are owners of the entire front of a block on the west side of Morningside avenue, West, in the city of

New York, running from the northwest corner of One Hundred and Seventeenth street to the southwest corner of One Hundred and Eighteenth street. The plaintiff owns from One Hundred and Eighteenth street running south 100 feet 11 inches, and the defendant owns from that point south 100 feet 11 inches to One Hundred and Seventeenth street. The plots are both located within 350 feet of Morningside Park, and hence, for certain purposes, are within the jurisdiction of the park department. (See Greater N. Y. charter [Laws of 1901, chap. 466], § 612, as amd. by Laws of 1901, chap. 723.) The defendant's premises are 120 feet deep and the plaintiff's premises are 125 feet deep. The plaintiff's premises are vacant. The defendant's premises now have thereon in course of construction a building covering in width the 100 feet 11 inches on the west side of Morningside avenue, West, with a depth of 100 feet, the intended structure being a six-story high-class elevator apartment house. On the 3d day of June, 1890, certain owners of property in that locality, for valuable consideration, for themselves, their heirs, successors and assigns, executed and delivered an instrument under seal, called a "set back agreement." Among those who executed said agreement were former grantors of both the plaintiff and the defendant. The said agreement recited:

"Whereas, the Department of Public Parks in said City propose that the whole of the Westerly sidewalk of said Morningside Avenue between One hundred and Tenth Street and said Amsterdam Avenue, late Tenth Avenue, being fifteen feet in width as now laid out, shall forever hereafter be kept unencumbered from buildings and open and free for public use and ornamentations, and the undersigned as such owners are willing to co-operate in carrying out such improvement," those signing covenanted "that thereafter the line parallel with the Westerly side of said Morningside Avenue, as now laid out and distant 10 feet Westerly therefrom between said 110th Street and said Amsterdam Avenue, late 10th Avenue, shall constitute the exterior building line of all buildings or structures to be erected or constructed upon said land of said respective parties, and that the Westerly side of Morningside Avenue as now laid out shall constitute the exterior area or stoop line of all such buildings and structures. And also that neither said parties who shall sign and

execute this agreement, their respective heirs, successors and assigns, nor any of them, shall or will at any time hereafter, build or erect or cause or suffer to be built or erected upon any of said land owned by them respectively within 10 feet of the Westerly line of said Morningside Avenue as laid out between said 110th Street and said Amsterdam Avenue, late 10th Avenue, any building or structure other than such as now is or hereafter may be permitted by law to be built or erected in said City between what is known as the exterior building or house line and the exterior area or stoop line. And also that the said parties who shall sign and execute this agreement, shall and will consent to the adoption by the Board of Aldermen of said City of an ordinance proper or necessary to carry this agreement into effect, and also that any such party or the heirs, successors, or assigns, of any such party shall be entitled as a matter of right to an injunction order, or decree from any Court having jurisdiction in the premises, to restrain any other party hereto, or the heirs, successors or assigns of any such party from the violation of this agreement."

The purpose of this covenant is plain. The sidewalk was to be widened ten feet, this set-back line was to take the place and stead of the building line established by the city, and beyond this set-back line nothing was to be built or erected other than such as was permitted by law to be built between the exterior building or house line and the exterior area or stoop line. This is an action for an injunction to prevent the erection proposed by the defendant beyond that set-back line. If the proposed structure would be lawful if the set-back line was, in fact, the building line established by the city, the action will not lie. If under such circumstances it would be unlawful, the action is well brought. The complaint alleges — and there is no dispute of fact in the case: "That the main front line of the said building, except the projections herein described, does not extend beyond the set-back line mentioned in the aforesaid agreement. That, beginning at point on said set-back line distant respectively fourteen (14) feet ten (10) inches and fifty-one (51) feet ten (10) inches northerly from the intersection of said set-back line and the northerly side of West 117th Street, defendant has commenced the erection of two several projections in front of said building. The said projections consist of permanent stone and

masonry walls, after the ordinary pattern or form of a bay window, said structure resting upon and being supported by the ground, and extending in front and to the east of said set-back line, from two (2) feet nine and one-half ( $9\frac{1}{2}$ ) inches to two (2) feet eleven (11) inches, and encumbering the space in front of said set-back line by such buildings, so as to prevent open and free public use thereof and access to the same, and the defendant is also about to erect or cause to be erected a portico having the width of fifteen (15) feet and extending eleven (11) feet eight (8) inches above the sidewalk level and extending easterly beyond the set-back line a distance of three (3) feet four (4) inches, the same being supported by two columns and two pilasters."

The defendant concedes that these so-called bay windows are part of the permanent front of the building; that they are built of masonry and extend from the foundation to the roof; that one of them has a frontage of eighteen feet eight inches, and the other nineteen feet three inches. Their walls are part of the walls of the front of the building, of the same material and the same construction, and the same thickness, as solid, substantial and permanent. In short, thirty-seven feet eleven inches of the said front wall of this building is built about three feet beyond the building line in the street, while the rest of it is built on the line. The defendant concedes the fact and claims that such construction is lawful. It claims that section 4 of general ordinance 1303 of the board of aldermen, in force on May 1, 1904, which provides that "Bay windows may be hereafter erected with a projection of not more than three feet beyond the building line, provided that when the projection exceeds one foot beyond the building line the total number of feet in width occupied by all the bay windows on the same frontage of the same building shall not exceed seventy-five per cent of the width of the frontage of the building," and the provisions of section 1 of said ordinance, "\* \* \* the park commissioners \* \* \* shall issue permits for the erection of bay windows projecting beyond the building line provided in the opinion of the officer having jurisdiction no injury will come to the public thereby. \* \* \* For the purposes of this ordinance a 'bay window' shall be taken to mean and include all projections on the face of the building in the nature of windows, such as are commonly called bay win-

dows, show windows, oriel windows and bow windows, without regard to the material of which they are constructed or to the purposes for which they are to be used," furnish the required authority.

These permits are revocable. Notwithstanding the able brief of counsel, it seems to me that this is no longer an open question. The facts are on all fours with *Ackerman v. True* (175 N. Y. 353), decided by a unanimous court. In that case, the house which the defendant built upon the lot adjoining the plaintiff's was extended three feet six inches beyond the easterly line of the street and had in addition what is known as a swell front or bay window also extending into Riverside drive. Judge MARTIN said: "The only remaining question that need be considered is whether the permit issued to the defendant by one of the commissioners of parks was legal and sufficient to justify him in erecting and maintaining the building in question upon a portion of the street, so that it constituted neither a public nor a private nuisance as to the plaintiff who suffered special damages by reason thereof. We think it was not. We have been referred to various statutes relating to this subject, upon which the defendant relies to sustain that contention, and from which he urges that the commissioners of parks are invested with power to permit such encroachments and erections as they shall see fit upon certain streets, of which Riverside drive is one. These statutes we have carefully examined without finding any such authority conferred upon the park board, or upon any member thereof, as would justify their granting to the owners of property abutting upon the line of such a street a permit or right to extend the main wall of a permanent and substantial structure three feet and six inches into and beyond the line of the street. \* \* \*

Any such construction of that statute would result in practically annulling that portion of the charter of Greater New York which provides that streets and other public places in the city shall be *inalienable*. (§ 71\*.) Although it is true that the title of the streets in the city of New York is in the municipality, that title is held by it in trust for public use, and not even the municipal assembly has authority to permit permanent encroachments thereon. While that body may, by ordinance, regulate the use of streets, highways, roads,

\* See Laws of 1897, chap. 378, § 71, as amd. by Laws of 1901, chap. 466.— [REp.

public places and sidewalks, and prevent encroachments upon and obstructions to the same, the charter\* expressly provides that 'they shall have no power to authorize the placing or continuing of any encroachment or obstruction upon any street or sidewalk, except the temporary occupation thereof, during the erection or repairing of a building on a lot opposite the same.' " After considering the power given to the park commissioners under the revised charter of 1901,† the court proceeded: "When, however, that provision is considered in connection with the other provisions of the charter relating to the inalienability of the streets, and depriving even the municipal assembly of any power to authorize the erection or continuance of any encroachment upon the streets, it becomes quite manifest, we think, that the Legislature did not intend thereby to confer upon a member of the park board the right to permit an abutting owner upon any of the streets of the city, whether within any park or outside, to encroach upon the street by the erection of permanent and substantial structures thereon."

The structure in the case at bar is both permanent and substantial. "Moreover," said the court, "if that statute were to be thus construed, its constitutionality would be at least doubtful, for even the Legislature cannot authorize the condemnation of private property for other than public uses."

In *McMillan v. Klaw & Erlanger Co.* (107 App. Div. 407) the action was brought by a property owner to restrain the defendant as owner of the adjacent lot from erecting as a part of its building thereon a structure about forty-five feet in height and extending into the street four feet beyond the building line. The defendant set up as a defense an ordinance passed by the board of aldermen of the city of New York, which it was claimed sanctioned and legalized the structure complained of. This court held: "No municipal or legislative enactment can justify or sanction such an invasion of the rights of private property guaranteed to the citizen by both State and Federal Constitutions, and, therefore, the ordinance set up in the answer is no defense to the plaintiff's cause of action." There

\* See Laws of 1897, chap. 378, § 49, subd. 3, revised in Laws of 1901, chap. 466, § 50, as amd. by Laws of 1905, chap. 629. The board of aldermen now possesses the power of the municipal assembly.—[REP.]

† See Laws of 1901, chap. 466, § 612, as amd. by Laws of 1901, chap. 723.—[REP.]

App. Div.]

First Department, March, 1906.

is nothing to be added to Mr. Justice O'BRIEN's careful examination of the subject in that case. Whatever cases may be in the books which tend to support a different rule must be held to be overruled by the *Ackerman* and the *McMillan* cases — until, at least, the Court of Appeals has again passed upon the question.

It may perhaps be relevant to point out that Presiding Justice VAN BRUNT, in a dissenting memorandum in *Broadbelt v. Loew* (15 App. Div. 343), accurately foretold the event. He said: "Such a rule would enable the common council to authorize the extension of all buildings into the street." By the ordinance of May 21, 1895, it was provided that show or bow windows not starting from the ground and not extending above the first story and not projecting more than *twelve inches* from the front wall might be erected. By the general ordinance of June 25, 1903, it was provided that property owners could be licensed to erect bay windows with a projection of not more than *three feet* beyond the building line, but required the consent in writing of adjacent owners. By the ordinance of June 25, 1903, however, they provided that a permit for the continuance of an existing bay window might be obtained *without* consent of adjoining property owners. We have seen the kind of special ordinance the board passed in the *McMillan* case. In the case at bar the solid structure from the foundation to the roof is claimed to be a bay window permissible under a revocable license. If the board has the power to authorize such a structure projecting three feet into the street why not six or ten? There is no such power.

But the injunction goes too far. The mandatory portions thereof requiring the taking down of that portion of the structure already in place ought not to be in an injunction *pendente lite*. That is the final remedy sought in the suit and should await final judgment.

The order should be modified by striking out the provisions requiring the removal of so much of the projections as have been constructed, and as so modified affirmed, without costs.

O'BRIEN, P. J., INGRAHAM and LAUGHLIN, JJ., concurred; PATTERSON, J., dissented.

Order modified as directed in opinion, and as so modified affirmed, without costs. Settle order on notice.

In the Matter of the Application of the NIAGARA, LOCKPORT AND ONTARIO POWER COMPANY, Respondent, Relative to Acquiring Title to Certain Real Estate for the Purpose of Constructing, Maintaining and Operating an Electric Transmission Line Thereon for Public Use, to Furnish Electricity for Light, Heat, Power or Any Other Purpose, to Certain Cities, Villages and Towns of This State, and the Inhabitants, Railroad Companies, Corporations and Manufacturing Establishments Thereof, of Which ROSALIA FLAKA, Also Known as ROSALIE FLARKE, Appellant, and ANTHONY FLARKE Are the Owners or Persons Interested Therein.

Fourth Department, March 7, 1906.

**Eminent domain — when immediate possession of condemned lands ordered under section 3380 of the Code of Civil Procedure on payment of money — said section constitutional — failure of owner of lands to state value thereof — what constitutes public purpose.**

Immediate possession of condemned lands will be awarded under section 3380 of the Code of Civil Procedure if public interests will be prejudiced by delay, upon the petitioner paying the proper value of the lands into court, even though the answer of the respondent in the proceedings to condemn lands fails to state the value of the lands as contemplated by said section.

Said section is to be construed in the light of its purpose, which is to enforce an immediate possession of lands condemned when public interest will be prejudiced by delay, and the contestant in such proceedings by refusing to set a value on the lands, by answer or otherwise, cannot be permitted to defeat the object of the statute.

A deposit of the fair value of the land, as shown by the petitioner by affidavits founded on its assessed value, is sufficient when the contestant at the request of the court refuses to set a value.

Section 3380 of the Code of Civil Procedure does not violate section 6 of article 1 of the State Constitution by authorizing the taking of lands without due compensation. The section is intended to insure to the owner the payment of the value.

The Niagara, Lockport and Ontario Power Company, incorporated to furnish electric power and water to towns, villages and cities and to the people of the State, is organized for a public purpose.

When the plant of the said company is partly constructed and the company is under contract to receive large quantities of electric power from other companies which are ready to deliver, and is also under contract to deliver certain power, and when the transmission of the power in other ways than those contemplated would be dangerous and impracticable, "the public interests will be prejudiced by delay" within the meaning of said section 3380 of the Code of Civil Procedure.



APPEAL by Rosalie Flarke from an order of the Supreme Court, made at the Erie Special Term and entered in the office of the clerk of the county of Niagara on the 1st day of November, 1905, permitting the plaintiff to enter immediately upon the real property described in the petition herein.

The plaintiff is an electric transportation corporation duly organized pursuant to the laws of the State of New York, and is engaged in constructing a line for the transmission of electricity from the city of Buffalo eastwardly to the central part of the State. Maps of the route have been filed, surveys made, nearly all the land necessary for the right of way, and which comprises a strip 200 feet in width, has been acquired in the counties of Erie, Niagara, Orleans and Monroe, and much of the actual work of construction has been performed.

The appellant, Rosalie Flarke, owns land in the town of Lockport, in the county of Niagara, one and three-fourths acres of which the plaintiff is seeking to acquire. Proceedings were commenced by plaintiff for the condemnation of the land mentioned in August last. An answer was interposed by the appellant denying nearly all the allegations of the petition, also containing affirmative defenses; and the issues were, in the latter part of September, referred to a referee, and the proceeding is still undetermined.

Early in October the present proceeding was commenced and an order granted at Special Term permitting the plaintiff to enter immediately upon the premises of the defendant described in the petition upon depositing with the court the sum of \$500, to be applied toward the payment of any award which may be made to her, including the costs and expenses of the proceeding. The money has been deposited in pursuance of the order. Other facts appear in the opinion.

*George F. Thompson*, for the appellant.

*Robert E. Drake and John H. Leggett*, for the respondent.

SPRING, J.:

The petition alleges that the value of the property to be condemned is three hundred and fifty-five dollars and eighty cents, and the affidavit of Mr. Scoby states that the land is assessed at thirty dollars an acre, and is worth not to exceed seventy-five dollars an

acre. The answer of the defendant specifically denies the estimate placed upon the property by the plaintiff, but does not contain any statement of its value. The appellant's contention is that the court consequently had no jurisdiction to designate or to ascertain a sum upon the payment of which temporary possession would be accorded it of the defendant's property.

The original proceeding is the usual one to acquire property for a public use where the plaintiff is unable to agree with the owner for its purchase, and seeks to have the compensation ascertained by commissioners as prescribed in section 3360 of the Code of Civil Procedure. The answer raised issues to be tried. There are two provisions of the Code of Civil Procedure pertaining to the possession of property by a condemning plaintiff, and which were incorporated in the Code of Civil Procedure by chapter 95 of the Laws of 1890. Section 3379 (as amd. by Laws of 1900, chap. 774) applies where the plaintiff is already in possession of the property sought to be condemned. Section 3380, which governs in the present instance, is applicable where the plaintiff is not in possession, but an answer has been interposed, "and it appears to the satisfaction of the court that the public interests will be prejudiced by delay;" thereupon the plaintiff may be given the immediate possession of the property to be taken, and permitted to devote it temporarily to the public use specified in the petition, "upon depositing with the court the sum stated in the answer as the value of the property." Subsequent provisions of the same section relate to the application of the money upon the termination of the proceeding, the payment of costs, etc., providing also for a judgment for deficiency if the sum deposited is inadequate to meet the award.

The position of the defendant is that inasmuch as the object of this section is to enable a corporation or person, for the use of the public, to deprive the owner temporarily, but against his will, of his own property, it must receive a strict construction; and as the answer omitted to contain any statement of the value of the property, the order is erroneous. We think this interpretation of the section is too narrow. The interposition of an answer often results in delaying for some time the termination of the proceeding to condemn. The owner of land who is endeavoring to obtain an exorbitant sum from the plaintiff for his premises may interpose an

answer and block the prosecution of the work in the face of the paramount necessity for its accomplishment. To guard against this unfair obstruction of the work, the Legislature came to the rescue by the enactment of the two sections mentioned. They are similar in the object to be attained and in the manner of accomplishment, except where the plaintiff is in possession, security in lieu of the payment of money may be directed by the court upon granting the order for the continuance of possession.

By section 3380, as well as by the preceding section, the Legislature had two cardinal purposes in view. *First.* Where the prosecution of the work contemplated by its charter was demanded by the public interests and prejudicial delay was likely to ensue from the interposition of an answer, a remedy was afforded the plaintiff to acquire immediate possession pending the proceeding. *Second.* The rights of the owner were sufficiently protected by the payment of the sum which he claimed under oath was the fair value of the property of which he was to be deprived. The mode of procedure prescribed is, consequently, beneficial to both parties. The right of the company to condemn being established, and the prejudice to public interests by delay appearing, the court will make the order, which, on the one hand, will enable the work to be carried on, and, on the other, will insure compensation to the owner for the property taken.

The reason for taking the value specified in the answer as the sum to be paid is to insure the defendant the full worth of his premises beyond a peradventure. If he intentionally or otherwise fails to state any value at all, the court is not thereby prevented from granting the relief where "the public interests will be prejudiced by delay." In construing the section we must keep in mind that the basic ground for the relief is the needs of the public. If the deposit made is entirely adequate the defendant is fully safeguarded, and that is precisely what the statute intended. It is of little importance how the sum to be paid is arrived at if the object designed is attained and the defendant is assured the full sum which may eventually be awarded him.

The counsel for the appellant admitted upon the oral argument of this appeal that the justice at Special Term endeavored to ascertain from him what he regarded as adequate compensation to his client. But the counsel declined to make any estimate, preferring

to rest his opposition upon the proposition that the failure to state any value in the answer barred the court from granting relief to the plaintiff. So upon the argument of the appeal counsel declined, upon invitation of the presiding justice, to inform the court whether he complained that the sum deposited was insufficient, reiterating the reason for his refusal. He also admitted that there had been no attempt on the part of the plaintiff to delay or obstruct the pending condemnation proceeding. We must assume, consequently, the concrete controlling fact that the sum deposited is ample to pay the defendant any award which will be made to her and protect her in every respect. The aim of the statute has, therefore, been accomplished.

Section 3365 of the Code of Civil Procedure does not require the defendant in condemnation proceedings to state the value of the property in his answer. It is not conceivable that the Legislature in the light of this fact would leave a loophole so that a contentious owner at any time might render nugatory the relief provided for in section 3380 by simply omitting to allege the value of the property sought to be taken.

Section 3382 of the Code of Civil Procedure is in point in so far as it denotes the purpose of the Legislature to invest the courts with general authority to make effectual "the object and intent" of the Condemnation Law. If the answer does not state the value of the property the "manner of conducting \* \* \* the proceedings therein is not expressly provided for by law." (§ 3382.) The only specific authority to compel the owner to give up temporary possession of his property is founded upon the allegation of value in the answer. But the intent of the Legislature was to permit the plaintiff to obtain possession upon the payment of a sufficient sum to compensate the owner fully; and if the conduct of the defendant, whether in good faith, inadvertently or maliciously, renders a strict compliance with section 3380 impossible, the general authority conferred upon the court by section 3382 is sufficiently comprehensive to enable the obvious purpose to be accomplished. As was said in *People ex rel. Wood v. Lacombe* (99 N. Y. 43, 49): "In the interpretation of statutes, the great principle which is to control is the intention of the Legislature in passing the same, which intention is to be ascertained from the cause or necessity of making the statute as well as other circumstances."

While the Condemnation Law by chapter 95 of the Laws of 1890, was made a part of the Code of Civil Procedure, yet section 3380 of that Code in its present form is a new provision. The right, however, to obtain temporary possession of the owner's land by a railroad company upon the payment into court of a sufficient sum, where pending the proceeding for condemnation it developed that the title of the defendant was defective, had been operative for some time. (Laws of 1850, chap. 140, § 21, as amd. by Laws of 1869, chap. 237; Laws of 1877, chap. 224, and Laws of 1881, chap. 649. See also Laws of 1875, chap. 606, § 24.) The pith of that statute composes section 3380 of the Code of Civil Procedure. The Legislature, in re-enacting the substance of the law, did not intend to vest an obstructing owner with full power to render its operation ineffective. He cannot prevent the adoption of that part of the statute which inures to the benefit of the public by refusing to avail himself of that portion which is beneficial to him.

Nor is section 3380 of the Code of Civil Procedure violative of section 6 of article 1 of the State Constitution. The property of the defendant is not taken from her without compensation. The essence of the section permitting possession to be acquired is that the owner must be assured the payment of the full value of the land of which he is deprived. It has long been held that payment to the owner personally is not an essential prerequisite to the taking of the land by right of eminent domain providing only compensation is made certain. (*Bloodgood v. Mohawk & H. R. R. Co.*, 18 Wend. 9.)

The plaintiff was created pursuant to chapter 722 of the Laws of 1894. Its sphere of operation was originally confined to the counties of Erie, Niagara and Orleans, but since its incorporation its certificate has been amended, whereby it is claimed the range of its territory and the scope of its business have been enlarged. Its purposes, as disclosed in section 8 of the act mentioned, are the supplying of pure and wholesome water and electricity to the towns, villages and cities along its route, and the generation, accumulation, transmission and distribution of electricity for a large number of objects enumerated in said section. It is given authority to take water from Niagara river (§ 10); to use the streets and highways and lay pipes therein (§ 11); to acquire land by purchase or condemnation proceedings (§§ 12, 13). Its power is coincident with that of other corporations

organized for the profit of the incorporators, but designed also for the benefit of the public.

The plaintiff has already entered into a contract for the construction of a canal, which is in process of building, and which when completed will be of sufficient capacity to generate 200,000 horse power. It has entered into an agreement with a Canadian power company whereby it is to receive a large quantity of electric power, a considerable portion of which is ready for delivery. It has also entered into an agreement with a construction company for the delivery of power to be used in the operation of certain street surface railroads, which are named in the moving papers, and the affidavits show that it is important that this power be delivered early during the present year. The contract calls for the delivery of this power at an early date, and the plaintiff is actively prosecuting the building of its line. The transmission of the electricity is at high voltage and along wires nine-tenths of an inch in diameter, which are supported by steel towers fifty feet in height. To transmit the electricity of the extraordinary high voltage of from 10,000 to 60,000 volts in wires along the streets or highways would be dangerous and impracticable.

The extent of the business contemplated, including as it does the furnishing of electricity for the use of the inhabitants in a thickly settled and extensive territory for illuminating purposes and for the use of extensive street surface railroads, we think constitutes a public use within the definition of that comprehensive term. (*Pocantico Water Works Co. v. Bird*, 130 N. Y. 249, 258 *et seq.*; *Matter of Burns*, 155 id. 23.)

The fact also sufficiently appears that "the public interests will be prejudiced by delay" if the defendant is allowed to block the plaintiff in the fulfillment of the plan for which it was organized, and retard the furnishing of electricity or water to the inhabitants along its route, or in supplying electrical power for the operation of railroads and for other necessary purposes which may fairly be for the benefit of the public.

The order should be affirmed.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

App. Div.]

Fourth Department, March, 1906.

HENRY WEBER, Appellant, v. EDWARD WALLERSTEIN and Others,  
Respondents. (No. 1.)

Fourth Department, March 7, 1906.

**Stockholder's action to recover corporate assets dissipated by fraud —  
when prior demand that corporation bring action not necessary —  
proper parties defendant.**

In an action by a stockholder, who claims to have been induced by fraud to place his stock in the hands of a trustee, and with other stockholders to have been defrauded, pursuant to a conspiracy of the officers of the corporation and others to put the corporation through bankruptcy to defraud its creditors and stockholders other than those participating in the conspiracy, to recover the assets dissipated by the collusion of said officers, it is not necessary to allege a refusal of the corporation upon demand to commence such action if the only officers upon whom such demand could have been made are shown to have participated in the conspiracy.

Under other circumstances such demand and refusal would be necessary to make out a cause of action.

Individuals not members of the corporation, who are alleged to have participated in the conspiracy, are properly made parties defendant in order that they may be compelled to account.

Though a plaintiff in such action has no standing save as a stockholder, the fact that his stock is held by said trustee does not prevent his action when the trustee is shown to have been appointed by fraud in which he participated.

It is not necessary to postpone the action until the termination of an action to recover the stock from said trustee.

APPEAL by the plaintiff, Henry Weber, from an interlocutory judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Oneida on the 2d day of September, 1905, upon the decision of the court, rendered after a trial at the Oneida Special Term, sustaining the defendants' demurrer to the complaint.

*Edwin H. Risley and Henry M. Love*, for the appellant.

*Theodore Baumeister and Samson Lachman*, for the respondents  
Wise and Regent Shirt Company.

*Frank Gardner*, for the respondents Wallerstein and others.

SPRING, J.:

The allegations of the complaint are numerous and verbosely stated. We shall confine ourselves to culling such as we deem essential to a comprehension of the only cause of action maintainable, and it is difficult, with that purpose in view, to compress the statement within reasonable compass.

A corporation known as Edward Wallerstein & Co. was duly incorporated in the State of Michigan in August, 1900. Its capital stock was \$300,000, consisting of first and second preferred and common. The large majority of the stock was held by the defendants Alfred and Edward Wallerstein, individually and as trustees, and by the defendant George Bruck. The plaintiff became the owner of \$3,000 of the first preferred stock of the corporation. The complaint alleges that he was fraudulently induced to accept this stock, but the allegation is unimportant, for he has no standing at all to maintain the action unless he is a stockholder of this corporation.

The corporation carried on its business in the State of Michigan until 1903. It also did business in the city of Chicago under the trade name of the Regent Shirt Company, but there was no organization or corporate entity to this offshoot of the Wallerstein Company.

In 1903 a creditor of the corporation was fraudulently induced to commence involuntary bankruptcy proceedings to have the corporation adjudged a bankrupt. An answer to the petition was "wrongfully filed," and at the instance of said Wallersteins a temporary receiver was appointed. The object of the receivership was to enable the Wallersteins to control and manage the assets and business of the corporation, which they did; and with the further purpose of securing an unfair adjustment with the creditors of the corporation. The purpose of this adjustment was to enable the chief stockholders and their friends ultimately to acquire the assets which would remain after the compromise had been satisfactorily arranged.

The defendants Wise were copartners in New York city, carrying on business in the name of Wise Brothers, and were creditors of the Wallerstein Company from \$20,000 to \$30,000. Irwin Wallerstein and Leo Steifel had become stockholders of the Wallerstein corporation, and the charge is that these two stockholders, with Alfred and Edward Wallerstein, entered into a conspiracy with



App. Div.]

Fourth Department, March, 1906.

Wise Brothers whereby the latter were to induce the creditors of the corporation to accept in full payment of their several debts fifty cents on the dollar. In order to accomplish this purpose the exact condition of the assets of the corporation was concealed from its creditors and they were all turned over to Wise Brothers, who, by the fraudulent scheme, were to receive full payment for their claim and additional compensation for services rendered in abetting the project.

In order to consummate the design, the stockholders who were participants in the conspiracy transferred their stock to the defendant Knopf as trustee, who was privy to the scheme. The plaintiff, believing the transaction was honest and for the best interests of all parties concerned, transferred his stock by blank indorsement to Dana H. Benjamin, who was the son-in-law of the plaintiff and a stockholder of the corporation owning second preferred stock of the par value of \$5,100. Benjamin, with like belief apparently in the integrity of the proposed adjustment, assigned his own and the plaintiff's stock to Knopf.

The compromise was effected, except that one or two favored creditors were paid in full. The bankruptcy proceedings were discontinued after the liquidation of the debts of the corporation and no trustee was ever appointed.

The complaint further charges that, after this compromise was accomplished, the value of the assets remaining of those fraudulently transferred to Wise Brothers was more than sufficient to pay all the first preferred stock of said corporation, and which included that issued to the plaintiff, and also substantially all of the second preferred of which Benjamin's formed a part. Benjamin subsequently assigned to the plaintiff his interest in the stock originally issued to the plaintiff, and also the \$5,100 owned by him and all his rights of actions connected therewith.

To carry out the original fraud, Benjamin was induced by fraudulent representations to enter into an agreement with Alfred and Edward Wallerstein, Bruck and Knopf for a division of the assets of the corporation, the greater part of which was to be owned by the defendants, or some of them. The defendant, The Regent Shirt Company, was incorporated in August, 1903, pursuant to the laws of the State of New York in accordance with articles of incor-

poration executed by these two Wallersteins and the defendant Stiefel, and that corporation is conducting a business in this State of the same kind as that carried on by the Wallerstein Company in Michigan. Since the compromise mentioned the said assets and property of said original corporation have been under the control and management of the said Regent Shirt Company and of the individual defendants.

The complaint also alleges that the said corporation abandoned its place of business in Michigan, and all the assets of the Wallerstein corporation which were in that State have been wrongfully removed therefrom by these defendants to the State of New York in order to make effectual their purpose to absorb its assets to the exclusion of the plaintiff and others similarly situated.

It is also alleged that there is no one of the officers or other person representing said corporation in the State of Michigan upon whom process may be served, and in October, 1904, it caused to be filed with the Secretary of said State a statement to the effect that the company had "no debts or credits."

The complaint, with tedious prolixity, contains extracts from the statutory law of Michigan and charges that the defendants and said corporation have flagrantly violated these statutes and the laws of that State. We do not deem it necessary to analyze or comment upon these provisions of law or the alleged infractions of the same, contenting ourselves with the general statement that the complaint does aver these violations.

The complaint alleges many other acts which it is unnecessary to enumerate, and which, it is charged, were connected with the chief conspiracy to make a dishonest adjustment with the creditors of the Wallerstein corporation and appropriate its assets or the avails thereof for the benefit of these defendants. There are also allegations connecting each of the defendants with the alleged scheme or some part thereof.

The action is commenced by the plaintiff in his own behalf and of all other persons in interest who may elect to join in the action. Several grounds are set forth in the demurrer, but it was sustained on the ground that the complaint fails to state a cause of action.

At the threshold of the discussion a disturbing objection, and the one which apparently influenced in a large measure the decision of

App. Div.]

Fourth Department, March, 1906.

the court below, is the failure to allege the refusal of the corporation, upon demand being made, to commence an action similar to the present one, or that it had unreasonably neglected to commence such an action. It is clear the plaintiff cannot accomplish his purpose to secure a recovery of the assets for the benefit of the stockholders except through the corporation itself.

The orderly mode of procedure, therefore, which seems to be somewhat rigidly adhered to, is for the stockholder suing to allege affirmatively a formal demand and refusal, or facts denoting a dereliction of duty by the directors to obtain by action the relief to which the stockholder deems himself entitled. (*Flynn v. Brooklyn City R. R. Co.*, 158 N. Y. 493, 508; *Niles v. N. Y. C. & H. R. R. R. Co.*, 176 id. 119; *Kavanaugh v. Commonwealth Trust Co.*, 181 id. 121; S. C., 103 App. Div. 95.)

This, however, is a rule of procedure which is a corollary of the proposition that the relief desired must be granted through the corporation, as the assets belong to it and cannot be converted into money or distributed, and the rights of the parties determined except through its agency. Each of the cases cited recognizes the right of an aggrieved stockholder to maintain an action to enable the corporation to regain assets dissipated through the collusion of its directors or officers, providing only the corporation upon demand refuses to enforce a like remedy or unreasonably postpones action. In that event, the corporation must be made a party defendant, and the allegations of the complaint must conform to an action commenced by the corporation. If it is determined there are assets of the corporation which should be accounted for, they are directed to be turned over to that body to be treated as its property.

In this case all the directors and officers of the Wallerstein corporation, and the stockholders as well who are known to the plaintiff, were charged with active participation in the fraudulent scheme by which its assets had been dissipated and appropriated by the defendants. It is obvious, therefore, that a demand upon these directors or officers to commence an action to obtain the relief sought by the plaintiff would be futile, for the gravamen of the cause of action is their own misconduct. In effect they would be asked to sue themselves upon a charge of fraud sufficiently grave to justify an indictment against them. A corporate entity must act

through its officers, and if to set in motion that body will inevitably inculcate those officials, the requirement of a useless demand would not seem to be necessary.

As was said in *Sage v. Culver* (147 N. Y. 241, 246): "Where the corporation is exclusively under the control of the trustees and officers whose acts and management are questioned a demand that the corporation bring the action would be idle and fruitless and in such cases equity permits the stockholder to bring the action in his own name."

In *Brinckerhoff v. Bostwick* (88 N. Y. 52) the plaintiff was a stockholder of a national bank, and brought an action in his own behalf and for other stockholders against the receiver, the bank and its directors charging the defendants with negligence in allowing the funds of the bank to be stolen and squandered. The court in considering the question under discussion used this language (at p. 59): "The action to recover such losses, as before observed, should in general be brought in the name of the corporation, but if it refuses to prosecute, the stockholders, who are the real parties in interest, will be permitted to sue in their own names, making the corporation a defendant \* \* \*. And that course of proceeding is also allowed if it appears that the corporation is still under the control of those who must be made the defendants in the suit \* \* \*. In such cases a demand upon the corporation to bring the suit would be manifestly futile and unnecessary. A suit prosecuted under the direction and control of the very parties against whom the misconduct is alleged, and a recovery is sought, would scarcely afford to the shareholders the remedy to which they are entitled, and the fact that the delinquent parties are still in control of the corporation is of itself sufficient to entitle the shareholders to sue in their own names."

The complaint fairly complies with the requirement that where the action is commenced by a stockholder it must allege substantially the same facts which would be pertinent in an action by the corporation itself. In an action by it the gist of the claim would be the fraudulent dissipation of its assets, and the object sought would be the revesting in the corporation of the control and dominion of the property thus diverted. In this case the corporation is a party defendant. The action is in equity and all the rights

App. Div.]

Fourth Department, March, 1906.

which would accrue to the corporation as plaintiff can be granted to it as defendant.

Nor is any remedy available to the plaintiff through the bankruptcy proceeding. That proceeding was for the purpose of disposing of the assets of the corporation for the benefit of its creditors. Upon their payment the proceeding was terminated. There is no officer in Michigan upon whom process may be served and no assets in that State to confer jurisdiction upon any of its courts. The assets are in the State of New York, the colluding officers of the corporation and the Regent Shirt Company, which by virtue of the fraudulent conniving of the directors of the supposed defunct corporation controls its business, are also in the State of New York. All of the parties to be affected by the judgment are within the jurisdiction of this State, and as the assets are here there can be no difficulty in adjusting the rights of the parties by this action.

It is claimed there is an improper joinder of causes of action in the complaint. There are allegations which, considered independently of other connecting averments, may be said to state a separate demand or claim. We must, in construing the complaint, realize that the pleader is attempting to state a multitude of facts and circumstances, all of which tend to show the collusive endeavor of the defendants to absorb the assets of this corporation. The defendants Wise were not stockholders of the corporation, but it is charged that they joined in with the other defendants to despoil the company of its property. Their presence may be necessary to the primary purpose of the action, which is to get the custody of the property into the Wallerstein corporation and compel an accounting of that diverted or squandered.

The fact that Knopf is the nominal custodian of the stock of plaintiff and of Benjamin is not an obstacle to the maintenance of the action in the light of the circumstances set forth. The claim is that Knopf, in collusion with the other defendants, acquired this stock for a fraudulent motive; that the payment of the creditors in any event was the excuse for the acceptance of the certificates by him. If this is true and the debts have been paid the plaintiff by right may be entitled to his stock. The agreement between Benjamin and the other stockholders is charged to have been executed through deception practiced upon him, and in fact the

whole project is imputed to a dishonest concerted attempt to get hold of the assets of the corporation.

The plaintiff is not obliged to defer his action until the end of the litigation with Knopf. In the meantime the assets might not be attainable at all. If Knopf was one of the parties in the general scheme alleged, and the transfer of this stock was a feature of the plot, he is a proper party defendant, and that aspect of the conspiracy can be determined in connection with the other phases of the fraud charged.

The plaintiff is not seeking to recover the debt which was canceled by the acceptance of the stock in the corporation, nor as a creditor. His only relief in this action, as already suggested, inures to him as stockholder and through the medium of the corporation.

In construing the complaint, even though it may contain allegations apparently inconsistent, we must assume the facts are true; and we think it states a cause of action, and the relief to be accorded, if the facts charged are established, may be readily determined.

The interlocutory judgment should be reversed, with the costs and disbursements of this appeal, and the demurrer should be overruled, with costs, with leave to the defendants to plead over upon payment of costs and disbursements of this appeal and the costs below.

All concurred.

Interlocutory judgment reversed, with costs, and demurrer overruled, with costs, with leave to plead over upon payment of the costs of the demurrer and of this appeal.

---

HENRY WEBER, Respondent, v. EDWARD WALLERSTEIN and Others,  
Appellants. (No. 2.)

Fourth Department, March 7, 1906.

**Receivers — when not appointed in action to recover corporate assets.**

When the allegations of the complaint in an action by a stockholder to recover corporate assets alleged to have been fraudulently converted are all made upon information and belief, a receiver *pendente lite* should not be appointed when the answering affidavits specifically deny the allegations of the complaint and state facts which exculpate the defendants from misconduct.

App. Div.]

Fourth Department, March, 1906.

APPEAL by the defendants, Edward Wallerstein and others, from an order of the Supreme Court, made at the Oneida Special Term and entered in the office of the clerk of the county of Oneida on the 8th day of June, 1905, appointing a temporary receiver of the defendant corporation, Edward Wallerstein & Company.

*Theodore Baumeister, Frank Gardner and Samson Lachman,*  
for the appellants.

*Edwin H. Risley and Henry M. Love,* for the respondent.

SPRING, J.:

The respondent has commenced this action as a stockholder of the corporation of Edward Wallerstein & Co., charging that its assets have been fraudulently diverted, and seeks to have them restored to the corporation.

This court has held the complaint states the cause of action mentioned (*Weber v. Wallerstein, No. 1, 111 App. Div. 693*). The allegations of the complaint are all set forth on information and belief. A motion was made by the plaintiff upon the complaint and the demurrers thereto for the appointment of a temporary receiver of the corporation. The defendants appeared and by affidavits positively denied the charges of fraud and the dissipation of the corporate assets. In addition the entire transactions which are set out in the complaint on information and belief are explained in these affidavits, and if the facts are correctly stated therein, the defendants are exculpated of the misconduct imputed to them.

In this situation there should be no receiver appointed pending the action, or at least until there is some urgent necessity for that drastic remedy. The statement of a cause of action alone does not warrant the granting of this relief. The receiver is authorized to take possession and control of all the corporate assets, and his incumbency will necessarily oust the corporation of the management of its affairs. Something beyond the mere unsupported statement of the plaintiff made on information and belief in the general allegations of a complaint should appear to warrant the appointment where the allegations are explicitly denied. (*Kisley v. Bar-*

*ron & Cooke H. & P. Co.*, 87 App. Div. 317; *Platt v. Elias*, 101 id. 518.)

The order should be reversed, with ten dollars costs and disbursements of this appeal, and the motion denied, with ten dollars costs.

All concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

---

ELIZA W. OSBORNE, Appellant, v. THE AUBURN TELEPHONE  
COMPANY, Respondent.

Fourth Department, March 7, 1906.

**Real property—injury to shade trees by erection of telephone poles—  
damage recoverable when injury is wanton—when complaint dismissed for failure to show damage.**

Although in an action by the owner of lands in a city to restrain a telephone company from erecting poles along the premises and for damage for "wrongfully, willfully and wantonly, without authority," destroying shade trees to plaintiff's damage of \$1,000, the plaintiff may be entitled to recover if the said destruction of the trees was wanton, etc., yet if the plaintiff has failed to give evidence of any damage, a dismissal of the complaint on the merits without prejudice to an action for damages by the plaintiff is proper.

Even though such defendant may act under legal authority in erecting its poles, it is liable for damage if an injury to property in so doing be "wanton and willful."

*It seems*, also, that compensation to an owner of city lands will be awarded if a telephone company in the prosecution of its business mutilates the trees of such landowner to such an extent as substantially to lessen the value of the premises.

APPEAL by the plaintiff, Eliza W. Osborne, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Cayuga on the 18th day of July, 1905, upon the decision of the court, rendered after a trial at the Cayuga Special Term, dismissing the complaint upon the merits.

*Charles T. Whelan*, for the appellant.

*E. C. Aiken and Hull Greenfield*, for the respondent.



App. Div.]

Fourth Department, March, 1906.

SPRING, J. :

The plaintiff is the owner of a large tract of land in the city of Auburn, fronting on South street and also lying north of and abutting on Fitch avenue, a street extending westerly from and at right angles with said South street.

The defendant is a telephone corporation with a franchise from the city permitting it to use the streets of the city, including Fitch avenue, in placing its poles and stringing its wires. The franchise imposed upon the defendant certain restrictions antecedent to the user, which have been substantially complied with, and where disregarded they are unimportant in the review of this appeal.

In the spring of 1904 the defendant was engaged in erecting poles and stringing wires along the north side of Fitch avenue adjacent to the premises of the plaintiff. The plaintiff has a row of shade trees along the north side of this avenue which were planted by the plaintiff and her husband over thirty years ago and which had attained considerable size and were an ornament to her premises.

The defendant dug holes for its poles and the earth removed was afterwards replaced by the employees of the plaintiff and was again taken out and the poles erected when they were cut down under the direction of the plaintiff. This action was thereupon commenced to restrain the defendant from erecting its poles and a temporary injunction was granted enjoining the defendant from digging on the north side of said avenue in front of the premises of the plaintiff, or from erecting poles or stringing wires along said land.

The plaintiff gave proof tending to show that large limbs on a number of the shade trees were cut off, rendering them unsightly. The defendant gave proof tending to show that only three limbs of any size were cut and that the plaintiff was present and consented to their removal.

The court found that the defendant "trimmed certain limbs of the shade trees," but "that said trimming was in part authorized by and consented to by said plaintiff." No proof of specific damages appears in the record, and the court directed the dismissal of the complaint on the merits, "but without prejudice to any action" for damages by the plaintiff.

The defendant derived the right to the use of the streets from the Legislature, subject to reasonable control and regulation by the

municipal authorities. (*Barhite v. Home Telephone Co.*, 50 App. Div. 25; *City of Rochester v. Bell Telephone Co.*, 52 id. 6; *New Union Telephone Co. v. Marsh*, 96 id. 122; *Village of Carthage v. Central N. Y. Tel. Co.*, 110 id. 625.)

It was, therefore, lawfully in the street and not subject to the plaintiff's interference simply because in the necessary development of its business it happened to erect poles contiguous to her premises. This right to the use of the street, however, is entirely independent of the question of the plaintiff's claim to compensation for any damages which may have resulted to her property by the construction of defendant's line. There has been much discussion of this subject by the courts, and no clear well-defined rule seems to have been reached.

In *Eels v. American Telephone & Telegraph Co.* (143 N. Y. 133) the plaintiff owned a farm, his title extending to the center of the highway. The defendant erected its poles along the road in front of these premises without having compensated the plaintiff or commenced proceedings for condemnation of the land. A recovery by the plaintiff was had in an action of ejectment, and the judgment was sustained by the Court of Appeals. The court was particular to place its decision upon the ground that the highway was in a country community and pointedly disclaimed any purpose of extending it to a street in a city. The distinction between this rural and urban use of the streets is also recognized in *Palmer v. Larchmont Electric Co.* (158 N. Y. 231) and in *Dillon's Municipal Corporations* (4th ed. § 688).

In *Castle v. Bell Telephone Co.* (49 App. Div. 437) the common council of the city of Rochester authorized the defendant to place its wires beneath the surface of Oxford street in that city. The plaintiff owned premises fronting on the street, extending to the center, and commenced an action to restrain the defendant from tearing up the street and locating the wires as directed by the municipal authorities. This court held that the use of the street contemplated did not impose any additional burden upon it, and that the abutting owner was not entitled to compensation. The principle was again reiterated, in a measure at least, in *Johnson v. New York & Pennsylvania Telephone & Telegraph Co.* (76 App. Div. 564).

We find no case holding that compensation will not be awarded the owner where a telephone company in the prosecution of its

App. Div.]

Fourth Department, March, 1906.

business mutilates the trees of an abutting owner to such an extent as substantially to lessen the value of his premises.

The complaint in the present action alleges that the defendant "wrongfully, wilfully and wantonly, without authority," trimmed and destroyed her shade trees to the damage of \$1,000. It then contains allegations impugning the right of the defendant to place poles in the street, and asks that it be enjoined permanently from carrying on its work. The plaintiff was content to prove the trimming of the trees without giving any proof showing to what extent any particular tree was damaged or whether the premises were depreciated in value by cutting the trees, and the question of damages was left to another action at the election of the plaintiff.

If these trees were trimmed "wilfully and wantonly," the defendant would be liable, independent of the question of its right to use the street without the payment of compensation to the abutting owner. The privilege permitted implies the ordinary use for the furtherance of the work within the purpose of the charter of the transportation corporation. If in the exercise of that power the corporation is negligent or wanton in the execution of its business to the detriment of a contiguous owner, it must pay the penalty of its rashness.

In *Donahue v. Keystone Gas Co.* (181 N. Y. 313) the plaintiff owned a lot fronting on Union street in the city of Olean, but not extending to its center. The defendant was a corporation using the street rightfully in the distribution of natural gas to the inhabitants of the city for heating and lighting, and its pipes were underneath the surface of the street. In front of the plaintiff's premises were a number of large maple trees. The defendant allowed the gas to escape from its pipes into the soil and about the roots of these trees, causing their destruction. The plaintiff recovered the damages sustained for the loss of the trees, and the judgment was affirmed. The right of the defendant to use the streets was unquestioned, but the manner of the use was the subject litigated, and liability followed by reason of negligence.

If in the present case the plaintiff had elicited tangible proof so that the trial court might have measured the damages, it might have ascertained them. As the record is presented to us, there is nothing to indicate that the plaintiff did not regard the damages as nominal.

The real controversy tried before the court apparently was the right of the plaintiff to place its poles upon the north side of this avenue. The damage to the trees had already been committed, and the plaintiff insisted, irrespective of any question of compensating her therefor, that the defendant was guilty of trespass in erecting its poles in the street. As already indicated, the plaintiff did show the cutting of the trees, and the defendant, if its witnesses are to be believed, established that but few limbs were trimmed, and they were removed with the consent of the plaintiff. The finding of the court does not definitely cover this controverted question of fact.

We may assume that the court adopted this course for the reason that the extent of the damages was not given or because he may have concluded that they were unsubstantial. In any event he afforded the plaintiff another opportunity to establish them if she desired to do so.

It is not important, as we view the case, whether plaintiff's title included one-half of Fitch avenue or was limited to its northerly boundary. She had planted and nurtured the trees, and the city had acquiesced in her ownership of them, and her title is sufficient to enable her to recover damages if she is otherwise entitled to relief.

The judgment should be affirmed, with costs.

All concurred.

Judgment affirmed, with costs.

---

GENEVA MINERAL SPRINGS COMPANY, LIMITED, Appellant, v.  
CHARLES A. STEELE and Others, Respondents, Impleaded with  
MARY E. COURSEY, Appellant, and Others, Defendants.

Fourth Department, March 7, 1906.

**Corporations — action to determine ownership of stock — findings unwarranted by evidence — written declarations in claimant's own behalf inadmissible — stock certificate book not made evidence by statute.**

Action by a corporation to determine the ownership of certain shares of its corporate stock and to call in certain alleged certificates, to declare certain certificates void, and to determine the rights of claimants to stock.

App. Div.]

Fourth Department, March, 1906.

A judgment in favor of certain stockholders is reversed and a new trial granted because of the following erroneous findings and rulings by the referee:

*First*, when the by-laws provide that no director shall receive compensation for performing any special services except by a two-thirds vote, and that no debt beyond the current expenses of the company shall be contracted by the directors without the assent of a majority of the stockholders, a finding that certain stock issued to a director by mutual consent of the directors, but without formal resolution and without being countersigned by the legally elected treasurer, as required by the by-laws, was the property of said director is error. Evidence for and against the authority to issue said stock, considered.

*Second*, when certain stock was assigned by the holder in consideration of a note by the assignee expressly providing for a reassignment if the note should not be paid, and the assignee never paid the note, and the assignor thereupon assigned all his interest in the note and the stock to another person, it is error to find a title in the first assignee and to refuse to determine the title of the second assignee. All parties being before the court, their respective rights should have been determined.

*Third*, when conflicting evidence as to the title of certain shares of stock has been received, and there is no specific finding as to whom said shares belong, a new trial is necessary.

*Fourth*, it is error to admit statements indorsed on original canceled certificates made by the claimant himself which show his title to the stock issued therefor. Such declarations in the claimant's own behalf are inadmissible, and a stock certificate book is not, like a stock transfer book, made competent evidence by Laws of 1875, chapter 611, section 17.

APPEAL by the plaintiff, Geneva Mineral Springs Company, Limited, and by the defendant, Mary E. Coursey, from a judgment of the Supreme Court in favor of certain of the defendants, entered in the office of the clerk of the county of Ontario on the 11th day of March, 1905, upon the report of a referee.

*John Gillette* and *Myron D. Short*, for the plaintiff, appellant.

*Charles A. Hawley*, for the appellant Mary E. Coursey.

*William S. Moore*, for the respondents Steele and others.

NASH, J. :

The action is brought to determine the ownership of the capital stock of the plaintiff corporation ; to call in certain certificates purporting to be certificates of its capital stock ; to declare certain of such certificates void, and that the respective rights of all persons

who have or claim to have any of the shares of the capital stock of the plaintiff be determined.

The recital of the history of the corporation and its affairs is required to show the necessity for and the particular purpose of the action.

In 1885 Stephen Coursey, Andrew J. Eshenour and Charles A. Steele entered into an agreement by which Coursey leased to himself, Eshenour and Steele a parcel of land in Geneva, known as Coursey's mill lot, for the purpose of boring for oil, gas or other mineral. A subscription was opened and money raised thereby to drill a well. The whole amount subscribed and paid in was \$2,425. A contract was made with A. D. Branch (who was on the subscription for \$100) to drill the well. They did not find oil or gas, but struck a vein of mineral water. The plaintiff was organized in the year 1886. The certificate of incorporation provided for a capital stock of \$3,000; 120 shares of \$25 each. Upon the organization no money was paid, but each subscriber to the well was allowed one share of stock for each \$25 subscribed to the drilling of the well. The object and nature of the business of the corporation was the bottling and selling and otherwise disposing of the water from the well. The plaintiff upon completing its incorporation took possession of the lands and premises upon which the well was located; made improvements thereon and engaged in the business for which the company was organized, managed by Steele as president and Coursey as treasurer of the company. The business not being successful was abandoned by the company. From December 1, 1886, for some eight years, no meetings of the directors of the company were held. The business during that time was conducted by Steele and Coursey, by Steele at first, who was in possession of the property, claiming it and the business as his own; afterward by Coursey who ousted Steele. After ousting Steele, Coursey and his brother Thomas Coursey, the owner of one-sixth of the fee of the premises, leased the property, with the privileges and appurtenances, including the spring, spring house and bath house, to Brooklyn parties at a yearly rental of \$6,000.

In the year 1894 a meeting of the stockholders of the plaintiff corporation was held and an election of officers had, and an action was commenced by the company against the Courseys and their

lessees to have it adjudged that the plaintiff owned the original lease of 1885, Coursey to Coursey, Eshenour and Steele, and that the lease for \$6,000 per annum inured to the plaintiff, and for an accounting by Stephen Coursey for the rents received, in which action the plaintiff had an interlocutory judgment for an accounting by Coursey and for a receiver to take the rents. The judgment was affirmed and an accounting was had, which resulted in a judgment against Coursey, the amount of which was reduced and the judgment finally affirmed by the Court of Appeals in the year 1902. (*Geneva Mineral Springs Co. v. Coursey*, 45 App. Div. 268; 57 id. 620; 171 N. Y. 664.)

After the determination of that action, in which the existence of the plaintiff as a corporation and its rights in the property were adjudged, this action was commenced to determine for the company who its stockholders really are so that it will be in a position to divide the moneys on hand and to accrue under the lease.

At the first meeting of the stockholders of the corporation held October 6, 1886, by-laws were adopted and Andrew J. Eshenour, Charles A. Steele, Stephen Coursey, Sidney S. Mallory and Mitchell H. Picot were duly elected as the five directors of the company, the number authorized by the by-laws. On the eleventh of October following the directors met, organized as a board of directors and elected Charles A. Steele, president; Andrew J. Eshenour, treasurer, and Mitchell H. Picot, secretary of the company.

The by-laws provided that certificates of stock should be signed by the president and countersigned by the treasurer. No certificates of stock were issued until May, 1887, when certificates of stock were issued signed by Charles A. Steele, president, and Stephen Coursey as treasurer, upon the request of Steele. Coursey was not treasurer of the company.

The referee finds:

"*Fourth.* \* \* \* It was determined by the subscribers and incorporators that all the shares of the plaintiff's capital stock should be issued to the persons who had contributed to the expense of drilling said well in proportion to their contributions, except \$500.00 thereof, which it was determined should be sold for the purpose of reimbursing the defendant Coursey for expenses incurred by him in addition to the amount of his subscription.

*"Fifth.* That accordingly plaintiff's directors and officers by mutual consent, but without the adoption of any formal resolution to that effect by the board of directors, procured a stock certificate book and a stock transfer book, and on or about the 9th day of May, 1887, the defendant Charles A. Steele, who was the duly elected president of the company, and the defendant Stephen Coursey, who was the acting, though not the legally elected treasurer of the company, made and delivered to the persons who had contributed to the expense of drilling the well or their transferees, certificates of stock in the plaintiff company in proportion to the amount of which each had contributed, except that they made and executed to the defendant, Charles A. Steele, certificate No. 29, for 20 shares. That these certificates were all dated October 15, 1886, and no seal was affixed to the certificates, the company having no seal at that time.

*"Sixth.* That said certificate No. 29 for 20 shares, was issued to the said defendant Charles A. Steele, after an unsuccessful attempt to sell the same had been made for the purpose of using the proceeds to reimburse the defendant Coursey, for said expenses incurred by him in drilling the well, over and above the amount of his subscription, by the consent of a majority of the directors, and on the agreement of the said Charles A. Steele to pay to said Coursey \$300.00 of the moneys so expended by said Coursey, and said Coursey's consent to accept that sum, and that said Charles A. Steele did pay said \$300.00 to said Coursey."

These findings, so far as they relate to certificate No. 29 for twenty shares, issued to the defendant Steele, are challenged by the plaintiff corporation as wholly unsupported by the evidence, and that the conclusion of law therefrom, that the defendant Steele thereby became the lawful owner of said certificate No. 29 and of the twenty shares of stock, is erroneous.

The contention of counsel for the plaintiff is that, according to Steele's testimony, his title to these twenty shares depends upon a private arrangement between Messrs. Steele, Coursey and Eshenour, whereby he (Steele) was to pay \$300 to cover expenditures made by him previous to incorporation and to receive credit for \$200 upon his own services. The plaintiff did not assume any obligation to Coursey by vote of the stockholders or directors. Neither was Steele allowed any compensation by vote of stockholders or direct-



App. Div.]

Fourth Department, March, 1906.

ors. The former could be done only by vote of a majority of all the stockholders, and the latter by a vote only of two-thirds of the directors, exclusive of Steele.

Mr. Steele, examined as a witness in his own behalf, was permitted to testify that in addition to what appears in the minutes of the meeting at which the officers of the company were elected by the directors on October 11, 1886, Mr. Coursey came before the meeting and stated that a twelve per cent assessment which had been made did not cover all the money expended on the spring, and that "there was a resolution offered there to increase the capital stock from \$2,500 to \$3,000 and make each share \$25, issue and sell \$500 more stock to pay Mr. Coursey for moneys he had advanced — he said that the 12 per cent assessment did not cover it — something like three or four hundred dollars. The resolution was passed."

It may be observed that the original certificate for the formation of the corporation signed by Steele, Eshenour, Coursey, Mallory and Picot previously made, and which was filed September eighteenth, provided for a corporation with a capital of \$3,000, with 120 shares of \$25 each. Steele further says: "I don't think that there was any resolution passed about it. It was general talk. \* \* \* They all said they wanted me to sell this stock. \* \* \* The matter was brought up or discussed at a directors' meeting November 1st, 1886. \* \* \* I reported at this meeting that I had been unable to sell any portion of this stock. Mr. Coursey brought up the matter of wanting money. I reported that I had made every effort that I knew how to dispose of this stock and could not get rid of any of it at any price; I said I would pay Mr. Coursey \$300 cash if I could raise the money for this stock and apply the balance on moneys I had paid out and work I had done, which was worth more than \$200. Mr. Coursey and Mr. Eshenour were the only ones present besides myself, that is, November first \* \* \* Mr. Coursey said and Mr. Eshenour said they wanted me to have this stock. Mr. Coursey said he would be very glad to have his money, and Mr. Eshenour said he would be very glad to have him paid, or words to that effect. \* \* \* November 18, I borrowed the money and paid Mr. Coursey \$300, and took a receipt. I have not that receipt. \* \* \* Q. What was said at that meeting — in addition to what appears in the minutes of the meeting?

\* \* \* A. I told Mr. Eshenour that I had paid Mr. Coursey for this stock \$300, as proposed November first, and that I thought we ought to get out our stock certificate book — and both Mr. Coursey and Mr. Eshenour told me to have the certificates printed, to get out the book — that a good many people wanted their stock.  
\* \* \* I was directed to get a stock book printed by Mr. Eshenour and Mr. Coursey. They were present at that meeting; there was no one else present that I know of.”

The objections of the plaintiff to the awarding of these shares to the defendant Steele are that the by-laws provided that no director should receive compensation for performing any special service for which compensation might be allowed, except by a two-thirds vote of the directors, not including his own vote, and that no debt or liability beyond the current expenses of the company should be contracted by the board of directors or any officer of the company without the assent of a majority of the stockholders. Furthermore, that it was not shown that Coursey had advanced moneys not covered by the twelve per cent assessment to the amount of \$300 or \$400 or any other amount, or that Steele had paid out moneys and had done work for the company worth \$200. There were statements merely to that effect made, as Steele says, at a meeting when only three of the directors, including Steele and Coursey, were present. The testimony of Coursey is to the effect that the company was not indebted to him for the \$300. His testimony is that Steele paid him the \$300 to apply upon an indebtedness of \$447 of Steele to Coursey for borrowed moneys, the balance of which, \$147, was included in a note given by Steele to Coursey, upon which the latter brought a suit against Steele, in which a recovery was had by Coursey.

We think the objections of the plaintiff to the judgment awarding these twenty shares of stock to the defendant Steele are well taken.

The appellant Mary E. Coursey contends that the third conclusion of law of the learned referee is erroneous, both for what it decides and for what it expressly fails to decide. The finding is as follows:

“*Third.* That the original transfer by Thomas Dunn (of) certificate No. 12 for 2 shares, and by Charles A. Baldwin of certificate

App. Div.]

Fourth Department, March, 1908.

No. 21 for 2 shares, to Charles A. Steele, were sufficient to vest in said Steele the title to such shares, but whether a right exists in subsequent transferees from said Dunn and Baldwin to recover said shares for failure of said Steele to perform the contract of purchase, is not determined."

Dunn held certificate No. 12 for two shares. On May 27, 1887, he assigned it to Steele, and received from Steele a paper, of which the following is a copy :

"GENEVA, *May 25th*, 1887.

"\$50. One year from date I promise to pay T. Dunn or bearer, Fifty dollars with use, for his interest in the Geneva Mineral Springs Co., which he has assigned to me, or (refund) the assignment to him with the added improvements, without cost to him.

"C. A. STEELE."

Steele never paid the fifty dollars. Dunn indorsed upon the foregoing paper the following :

"For value received I assign all my interest and title to Stephen Coursey in this note and in the spring.

"THOS. DUNN."

He also gave to Coursey the following paper :

"Fifty Dollars.

*October 14*, 1890.

"For value received I hereby sell and assign all my right, title and interest in the Geneva Mineral Spring to Stephen Coursey of Geneva, N. Y.

"THOS. DUNN."

These papers were delivered to Coursey.

The Baldwin case is precisely similar. He had two shares. Steele gave him a similar paper, which was transferred to Coursey.

It would seem that, although, as the referee finds, the conditional transfers of these shares by Dunn and Baldwin were sufficient to vest the title in Steele, it went back in default of payment and passed by assignment to Coursey.

In the eleventh finding of fact the Dunn shares are included in the schedule of shares stated to have been transferred to, and now owned and held by the defendant Charles A. Steele, and the two Baldwin shares are stated in the seventeenth finding to have been transferred to and are now owned and held by the defendant

Daniel E. Moore. How the latter acquired such ownership does not appear. The judgment follows the conclusion of law as to both the Dunn and Baldwin shares, and as to those "whether a right exists in subsequent transferees from said Dunn and Baldwin to recover said shares for failure of said Steele to perform the contract of purchase, is not determined."

The parties being all before the court; their rights as to such shares should have been adjudged. The omission is a mistrial as to those shares.

A. D. Branch, the contractor, who drilled the well, subscribed \$100 and paid his subscription. He was, therefore, a stockholder entitled to four shares.

There is no specific finding in the report as to the four Branch shares. He had disappeared at the time the corporation was organized. Branch became indebted to Coursey, who sued in Justice's Court, got an attachment, levied on the stock, and it was sold; Coursey bought it; he assigned all of his stock to his wife, Mary E. Coursey. The Branch shares are claimed by the defendant Steele, upon evidence given by himself.

He testified: "I bought two of those original Branch shares and now hold them, I guess. I bought two from Stephen Coursey. How I know that I bought the two Branch shares is because I bought half of Coursey's subscription, it was not shares, it was subscription. Of those subscriptions which Coursey and I got out, Mr. Coursey had one, Mr. Eshenour had one, and I had two, representing Branch's subscription to the well. That is, when Coursey and I got out these certificates, I got out a certificate of six shares to Charles A. Steele, two of which represented the Branch subscription to the well. \* \* \* I bought these two from Mr. Stephen Coursey. The evidence I had of Stephen Coursey's right or title to the Branch subscription, or any part of it, was that he made a levy on his property, and included that, and it was sold to me, and I paid for it."

Mr. Steele also testified as follows regarding the Branch shares: "Mr. Coursey bought Mr. Marshall's certificate of stock for two shares and subscription, and levied on A. D. Branch's property and subscription; he sold Mr. Branch's subscription, two shares to me, one to Mr. Eshenour and kept one himself. He was an original sub-

scriber for four shares, and the two shares he bought of Mr. Marshall early in 1886 and the one from Mr. Branch, made him seven shares."

The case shows that Mr. Coursey put in \$75 in addition to his original well subscription of \$100, which entitled him to the original seven shares of stock represented by his original certificate of stock, and, therefore, could not have included any of the Branch stock.

There is no specific finding in the report from which it can be determined to whom the Branch shares have been allotted by the judgment.

The appellant Mary E. Coursey contends that twenty-six shares of stock, the title to which she claims by assignment from her husband, Stephen Coursey, were erroneously allotted to the defendant Steele as assignee of Coursey. Coursey claimed that these twenty-six shares had never been assigned to Steele. Steele claimed them by a lost assignment.

The question involves five certificates originally issued as follows: No. 8, to Phillips & Clark, four shares; No. 17, to E. J. Rogers, one share; No. 26, to A. J. Eshenour, eight shares; No. 27, to Coursey, seven shares; No. 33, to H. M. Picot, six shares.

These certificates, returned for cancellation and new certificates, were pasted to the stubs in a stock certificate book, each of which is regularly assigned by written assignment signed by the original holder, indorsed on the back to Stephen Coursey, except the certificate originally issued to Coursey for seven shares, on which no assignment is indorsed.

The company's stock transfer book had been lost and a new one made by Steele from his recollection of the contents of the other. This was offered in evidence and excluded.

On the back of each of the originals of these five certificates in question, returned and pasted in the stock certificate book, there appears a written statement in the handwriting of Steele, to the effect that the certificate is one of twenty-six shares of stock assigned by Coursey to Steele.

On certificate No. 27 to Coursey, seven shares, on which there is no assignment indorsed, this writing of Steele is as follows:

"This stock, represented by the within certificate No. 27 for seven shares, is included in the 26 shares stock sold and delivered and transferred to C. A. Steele on October 8th, 1887, by Stephen Coursey, on stock transfer book No. I.

"C. A. STEELE."

On certificate No. 26, to A. J. Eshenour, there is a transfer to Coursey, as follows:

"For value received, I do hereby constitute and appoint S. Coursey, true and lawful Attorney for me and in my name to transfer to Stephen Coursey eight shares of the capital stock of the Geneva Mineral Spring Co., Limited.

"Done at Geneva this the 26th day of May, A. D. 1887.

"A. J. ESHENOUR. [SEAL]."

Steele's memorandum:

"This stock, represented by the within certificate No. 26 for eight shares, is included in the 26 shares stock sold and delivered and transferred to C. A. Steele on October 8th, 1887, by Stephen Coursey on stock transfer book No. I.

"C. A. STEELE."

And to the same effect are the memoranda indorsed on the certificates No. 33, to H. M. Picot, six shares; No. 17, to E. J. Rogers, one share; No. 8, to Phillips & Clark, four shares.

The stock transfer book designated by Steele in these memoranda as "stock transfer book No. I" refers to the lost stock transfer book.

Notations were also made in the handwriting of Steele on the stubs to which the certificates were pasted of the assignments of the several certificates by Coursey to Steele.

This book of returned original certificates, including the statements indorsed upon the certificates by Steele, and the notations on the stubs, the entire book, was offered in evidence in Steele's behalf, to which objection was made by counsel in behalf of Mrs. Coursey, and also by counsel in behalf of the plaintiff. The ruling and exceptions were as follows: By the Referee: "The legal effect of any indorsement which Mr. Steele may have made in his own behalf will be received for disposition at the proper time. Book and all memoranda received. Exceptions taken."

The record does not show any further disposition of the question.

App. Div.]

Fourth Department, March, 1906.

as to the admission in evidence of the writings of Steele on the certificates or on the stubs. They stand as evidence in the case.

The stock certificate book cannot be regarded as a stock transfer book, such as was required by the statute under which the plaintiff was incorporated to be kept, and which was made presumptive evidence of the facts therein stated in favor of the plaintiff in any suit or proceeding against a stockholder. (Laws of 1875, chap. 611, § 17.) Especially, the statement on the back of the several certificates: "This stock, (Eshenour) represented by the within certificate No. 26 for eight shares, is included in the 26 shares stock sold and delivered and transferred to C. A. Steele on October 8th, 1887, by Stephen Coursey on stock transfer book No. I. C. A. Steele."

These writings, indorsed by Steele upon the returned certificates, must be regarded as having been made by him for his own benefit, not in the performance of his duties as an officer of the company, wholly self-serving, and, therefore, incompetent as evidence in the case for any purpose. The evidence was of the greatest importance upon the question at issue.

It is suggested that objection was not specifically made to these indorsements upon the certificates. The entire certificate book was offered and objected to. The book contained the objectionable statements upon the certificates and was, therefore, as a whole, incompetent. Upon objection being made the offer should have been limited to the portions of the book deemed competent. If the objection had been sustained a specific offer would have been required to make it effective. The book was an official record only of the certificates returned and canceled. The memoranda upon the stubs formed no part of a stock transfer book required to be kept by the statute. That book had been lost, and the new one made by Steele from memory, offered in evidence, was excluded. These memoranda upon the stubs were not competent as evidence. They were not made so by the statute. The notations of transfers on the stubs of the certificates were unnecessary. The stubs of the new certificates would show to whom the new certificates were issued.

We conclude that a new trial should be granted upon the grounds appearing in the discussion which has been had, without passing upon other questions in the case discussed by counsel, which may not arise upon a new trial.

The granting of a new trial makes it unnecessary to discuss the question raised by the appeal of the plaintiff from the order of the Special Term denying the motion to vacate the judgment.

All concurred.

Judgment reversed and new trial ordered, with costs against defendant Charles A. Steele to the appellants plaintiff corporation and Mary E. Coursey to abide the event upon questions of law and fact.

---

THOMAS LOFTUS, Respondent, v. THE STRAIGHT LINE ENGINE COMPANY, Appellant.

Fourth Department, March 7, 1906.

**Stay of proceedings for failure to pay costs of former action.**

When a plaintiff brings a second action without paying the costs of a former action, the court will order payment of the costs in the first suit before allowing the second to proceed.

This is so although the defendant answers in the second suit before moving for the stay.

APPEAL by the defendant, The Straight Line Engine Company, from an order of the Supreme Court, made at the Onondaga Special Term and entered in the office of the clerk of the county of Onondaga on the 18th day of November, 1905.

*Harry A. Talbot*, for the appellant.

*Welch & Parsons*, for the respondent.

NASH, J. :

This is an appeal from an order of the Special Term denying a motion made by the defendant to restrain the plaintiff from taking any further proceedings in the action until he shall have paid the costs and disbursements recovered by the defendant in a former action.

The rule is that, if the plaintiff brings a second action without paying the costs of the first, the court will order payment of the



App. Div.]

Fourth Department, March, 1906.

costs of the first suit before allowing the second to proceed. (*Cuyler v. Vanderwerk*, 1 Johns. Cas. [2d ed.] 247, and note.)

The order recites that the defendant answered before making the application, and the point is made by the respondent that the defendant, not having made the motion until after serving its amended answer, waived by its laches any right which it might have had to the stay.

In the case cited it is said, *per curiam*: "The defendant is never too late, pending the second suit, before trial, to make his application to stay the proceedings." In *Jackson v. Miller* (3 Cow. 57) the motion was made after a verdict in the second action had been taken subject to the opinion of the court; objection was made that the application came too late. *Per curiam*: "The application comes before us in season if made at any time while the cause is in a course of litigation."

In *Spaulding v. American Wood Board Co.* (53 App. Div. 314), the case relied upon by the respondent, the motion was made, although not heard, before an answer was served. That fact was referred to in the opinion, and it was observed that the motion was in time, from which it might be inferred that the motion should be made before serving an answer. But as there was no discussion of the question, the case cannot be regarded as an authority for overturning the long-established rule that the right is absolute, and that the application for the stay may be made at any time while the cause is in the course of litigation.

The order should be reversed, and order restraining plaintiff's further proceedings until payment of the costs of the former action granted.

All concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

THOMAS HILLOCK, Respondent, v. JOHN GRAPE, Appellant.

Fourth Department, March 7, 1906.

**Partnership—capital contributed by partner to be returned on dissolution before division of profits—evidence insufficient to show that property contributed by one partner became firm property.**

When, in an action to establish a partnership and for an accounting, the plaintiff's evidence as to the terms of the alleged partnership is in substance that the defendant was to put in horses and wagons then owned by him against the plaintiff's experience in the trucking business, and that the parties were to divide the profits, and when it is also shown that the defendant individually purchased and paid for all additions to the partnership property, a decree allowing the plaintiff to share in the property and assets of the business is unwarranted.

The title to property put in as capital against the labor of another remains in the partner contributing it. The profits only are to be shared by the parties. The same is true of additional property not purchased with the money or profits of the partnership, but purchased by one partner with his own funds. SPRING and KRUSE, JJ., dissented, with opinion.

APPEAL by the defendant, John Grape, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Monroe on the 28th day of September, 1905, upon the decision of the court rendered after a trial at the Monroe Special Term.

*Thomas Raines and E. O. Gibbs*, for the appellant.

*John H. Keef*, for the respondent.

NASH, J.:

This is an action to establish a copartnership and for an accounting. The copartnership is denied. The complaint alleges that on or about the 1st day of March, 1901, at the city of Rochester, N. Y., the plaintiff and defendant entered into a general trucking and carting copartnership, each to be an equal partner therein, the firm name to be Grape & Hillock, and the assets of the firm at the first were to consist of four horses and two wagons put into said business by said Grape, against the knowledge and experience Hillock

App. Div.]

Fourth Department, March, 1906.

had of and in trucking and carting business, they to own said property so put in and whatever other property bought thereafter for such business, jointly; that such copartnership has been carried on ever since such date and has made about the sum of \$2,900 for the year 1901, \$4,800 for the year 1902, \$6,250 for the year 1903, and \$5,320 for the year 1904, to September 1, 1904, making \$19,270 received in cash by such copartnership since said 1st day of March, 1901, besides the trucks, carts, horses, harnesses now owned by such copartnership, namely, seven pairs of horses, wagons, sleighs, harnesses and other property of the value of \$6,000, and an established trade and business worth the sum of \$2,000.

There were no written articles of copartnership. The witnesses who testified to the making of the alleged agreement on the part of the plaintiff were Freckleton, a nephew of the plaintiff, and the plaintiff. Freckleton testified that Grape applied to him and asked if he was a nephew of Hillock, and if he knew whether his uncle would go into the carting business. That Grape said: "I have got five horses and a little money in the bank, and two wagons and a small wagon or sleigh, and why can't Tom and I go into business together, and he put his experience against what I have got?" Afterward Grape and Hillock having met and had some negotiations, they came together and in the presence of Freckleton made, it is claimed, the partnership agreement. Freckleton's testimony is: "I said, now, Mr. Grape, what do you intend to do? What are your plans? Mr. Hillock wants me to be a witness to this copartnership. Grape said, 'I have five horses, two large wagons, a small wagon, the running gear, bobs or sleigh, and about six hundred dollars in the bank to pay any running expenses they might have when they got started.' Q. Tell what one said, then what the other said. A. Grape said they would take, each of them, so much money out of the business each week, as the business would warrant after the business was started. No specified amount was named at that time. Q. Anything else said there? A. They said, 'we will get together,' and he said, 'I think I know where we can get another wagon or sleigh, or a top for a sleigh.' Q. Who said that? A. Grape. He made arrangement for Hillock to meet him to go to some wagon or blacksmith shop. Hillock said one of the

first things they ought to do was to get some blanks they could put in the freight house, for authority to receive freight. He said he wanted the cards so he could start out with people he knew, and see if they could get their business. They started out and agreed to go to the printers to get some cards. I did not hear any further conversation beyond a general line. Q. Did they say what they were going to call the business? A. Grape said he wasn't particular whether they called it Hillock & Grape, or Grape & Hillock. They decided on Grape & Hillock before they went away. After the talk was over I asked Grape if something hadn't ought to be done about drawing papers about the copartnership. Grape said he had a friend, Assemblyman Smith, and he would have him draw the papers. That was practically the end of that conversation."

Hillock testified that a few days before Grape first met Freckleton, he saw Grape and they talked the matter over. He says that Grape said "he had two teams and a single horse and two wagons and sleigh, and he would put them up against my experience in the business." That he afterwards went and looked at the property, and after some further negotiations they met by appointment at a restaurant and made the agreement testified to by Freckleton. Hillock's testimony is, as follows: "Q. What was said in the restaurant? A. Grape went over the same thing about the two teams and single horse and two wagons and sleigh and tools. He put them all up against my experience in the business, and he had money in the bank to pay freight bills. \* \* \* Then I made the agreement with him that I would go in with him. \* \* \* Q. How long after that did you start together in the carting business? A. About the 1st of March, 1901. Q. When you wanted any money did you draw it from the firm? A. Grape and I made arrangements that we would draw so much a week the first year, and go as light as we could till we got started. We made arrangements to draw eight dollars each. Q. And the next year? A. He said the next year we could draw nine dollars a week, and in a few more years we could probably draw fifteen a week."

The defendant admits that a partnership was proposed and that he had conversations with Hillock upon the subject, but denied that any partnership agreement was ever made.

His claim is that Hillock entered into his employment in the

App. Div.]

Fourth Department, March, 1906.

carting business; that upon Hillock's representations as to his ability to get work among his friends by the use of his name, cards with the name of Grape & Hillock upon them were used, and the name of Grape & Hillock was put on one or two of the wagons and a sleigh.

The plaintiff worked with the employees during the three years and a half rendering services as a laborer. On pay day he received his money in an envelope with the rest of the men, and was docked as they were for lost time. The business was all transacted by Grape in his own name. He employed, directed and paid all of the men and made all the additions to the property by purchase in his own name.

The court below found as facts:

"That on the 1st day of March, 1901, at Rochester, N. Y., plaintiff and defendant entered into an agreement, in and by which they agreed to form and did form a copartnership between them for an indefinite period, to conduct and carry on the business of drawing and conveying for hire, goods and merchandise, and to conduct a general carting business at said Rochester, N. Y., under the firm name of Grape and Hillock.

"*Second.* That in and by said agreement defendant agreed to contribute to the capital and assets of said copartnership four horses and two wagons, and said plaintiff agreed to contribute to the business of said copartnership the knowledge and experience which plaintiff had acquired in the trucking business.

"*Third.* That in and by said agreement the said parties further agreed that each partner should devote his time and energy to the prosecution of said business, and that said partners should share equally all profits and losses of said business.

"*Fourth.* That said copartnership continued and said business was prosecuted by said partners from and including said March 1st, 1901, to September 3d, 1904, when said copartnership terminated by plaintiff's election and notice thereof given by plaintiff to defendant."

It is further found that the partnership sold property from time to time, and acquired divers articles of property; that all purchases and sales were made by the defendant; that the plaintiff demanded of the defendant that he account to the plaintiff and pay over to him the portion of the copartnership assets to which he

should be found entitled, which was refused, and, as a conclusion of law, that the plaintiff is entitled to an accounting by the defendant of and concerning all the property, assets, receipts and disbursements and business of the copartnership, from the beginning of the same to the termination thereof. It is so adjudged by the interlocutory judgment.

The contention of the defendant is, that the finding that an agreement of copartnership was entered into is against the weight of the evidence.

Without passing upon that question, we conclude that a new trial must be granted, upon the ground that the decision, to the effect that the plaintiff is entitled to a portion or share of the property and assets of the business, is entirely unsupported by the evidence.

The witness Freckleton on his cross-examination testified that it was his understanding that Hillock was to be a joint owner with Grape of all the assets of the copartnership, including the horses, wagons, sleighs, harnesses and the equipments, and the \$600 in the bank, put in by Grape. The plaintiff was asked on cross-examination: "Q. You were to have half the money and a half interest in the horses and wagons and sleighs, and the equipment? A. That was the agreement." These were mere conclusions; neither of them testified to any language of Grape to that effect. The language imputed to Grape by both Freckleton and Hillock on all occasions testified to by them was that Grape would put up his property against Hillock's experience.

The language attributed to Grape, as testified to by Freckleton and Hillock, that Grape would put up his property against Hillock's experience, will not bear the construction put upon it by the decision. It implied, at most, only a partnership as to the profits, and not a community of interest in the property which Grape put up against Hillock's experience. Agreements by which one person contributes his labor and experience to the business of a copartnership, for a share of the profits, are often made. The rights of the parties are well understood by the persons concerned. The title to the property as capital put in against labor remains in the owner, the profits only being shared by the parties. The construction put upon the alleged agreement by the plaintiff would work out a result

App. Div.]

Fourth Department, March, 1906.

which could not possibly have been intended by the defendant. The contract testified to, and as found, was for an indefinite period. If the title to an equal share of the horses, wagons, equipment and money of Grape passed to the plaintiff by virtue of the alleged agreement, Hillock could have terminated the copartnership at any time. At the end of a week he could have demanded that the defendant account to him for one-half of the property.

There is no evidence in the record that the additional property was purchased with the money or profits of the business. The purchases were all made by the defendant. The plaintiff did not participate in making them. Grape made the purchases and paid for the property purchased, as far as appears, with his own money and means. At the time of the trial he was indebted to Hartung, of whom the additional horses were purchased, some thirteen or fourteen in number, upon his individual promissory notes, one for \$800 and another for \$500, and there was also an indebtedness of the defendant to the Hoffman Wagon Company on account, which had accrued in the course of the business, amounting to between \$800 and \$1,200.

Interlocutory judgment reversed with costs, and new trial granted, with costs to appellant to abide the event.

All concurred, except SPRING and KRUSE, J.J., who dissented in an opinion by KRUSE, J.

KRUSE, J. (dissenting):

I dissent. I think the question was a fair question of fact whether the agreement between the parties was made as claimed by the plaintiff. If it was, it constituted a partnership, and the trial court having so found, such decision ought not to be disturbed by this court.

While the property which was put into the business by the defendant became the property of the firm, yet upon an accounting the plaintiff will receive the full benefit thereof, each party will be credited with the amount of capital contributed by him. The plaintiff seems to have had but a working interest in the firm, contributing his labor and business experience, while the defendant contributed substantially all the capital, but the profits were their joint

efforts and should be divided between them, making the proper allowance for what one may have contributed to the capital more than the other.

I think the interlocutory judgment should be affirmed, with costs.

SPRING, J., concurred.

Interlocutory judgment reversed, with costs, and new trial granted, with costs to appellant to abide the event.

---

GEORGE A. MAKIN, an Infant under the Age of Twenty-one Years, by His Guardian ad Litem, HELEN E. MAKIN, Respondent,  
v. THE PETTEBONE CATARACT PAPER COMPANY, Appellant.

Fourth Department, March 7, 1906.

**Negligence — injury to hand by roller of paper mill — when risk not obvious or assumed — failure to give instructions.**

The plaintiff, an infant of sixteen years, had his hand crushed between revolving rollers on a paper machine, while engaged as a "backtender." He had to work in a space of two and one half feet between two sets of revolving rollers, and if the paper broke in passing from one set of rollers to another, it was his duty to cut off the paper accumulating and insert the sheet between the other set of rollers. This had to be done while the machinery was in motion and required quick and accurate work. It was shown that there was a tendency in the rollers to draw in the waste paper between them and that the defendant did not know of and had not been warned of this danger.

*Held*, that the negligence of the defendant was for the jury and that a verdict for the plaintiff was warranted by the evidence; that as a matter of law the risk was not obvious and assumed by the plaintiff.

NASH and WILLIAMS, J., dissented, with opinions.

APPEAL by the defendant, The Pettebone Cataract Paper Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Niagara on the 11th day of March, 1905, upon the verdict of a jury for \$8,000, and also from an order entered in said clerk's office on the 5th day of July, 1905, denying the defendant's motion for a new trial made upon the minutes.



App. Div.]

Fourth Department, March, 1906.

This action was brought to recover damages for personal injuries alleged to have been sustained by plaintiff through the negligence of the defendant, while in the defendant's employ, working in a paper mill. The accident occurred on the 4th day of March, 1904. The plaintiff, a boy of about sixteen years, was on that day put at work as backtender on a machine consisting in the main of two sets of rollers used in the manufacturing of paper. His hand was caught between the rollers and crushed. Other facts appear in the opinion.

*Maulsby Kimball*, for the appellant.

*Robert H. Gittins*, for the respondent.

KRUSE, J. :

I think the judgment appealed from should be affirmed. While it is true that this boy, the plaintiff, had worked around the mill for some time before the accident, he had never before done the work which he was attempting to do when he was hurt. It was dangerous and required close attention, quickness and skill. He received no instructions or warning of its dangers, some of which were hidden and unknown to him, and the very first attempt he made to dispose of the waste paper his hand was suddenly drawn with the paper toward and between the fast revolving rollers and crushed. The work he was doing was called backtending. There were two sets of rollers. The two sets were about two and a half feet apart and the plaintiff was required to work in this space. Up to about a month prior to the accident there had been about five and a half feet of space between the two sets of rollers, but additional dry rollers had been added and the space narrowed, thus increasing the danger. Until this space was narrowed the waste or spoiled paper had not been drawn toward and caught of itself between the two lower calenders as will be presently described. The paper in process of manufacture passed over and between one set of rollers known as the driers, and then across to the other set known as the calenders, from which it wound on a reel. At times the paper would break in passing from the driers to the calenders and then wind around the last drying roller. The backtender was then required to go between the two sets of rollers and quickly cut the

paper from the dry roller where it was accumulating, whereupon the paper, instead of passing up over the calenders, would fall upon the floor between the two sets of rollers. This waste or spoiled paper was then put between the two lower calender rollers and carried away, dropping on the other side of the calenders. After the slack had been thus taken up the paper was snapped off, and the end nearest the drier taken over to the calenders and placed between the two upper calender rollers, and the process of making and finishing the paper was resumed.

When the paper broke it required prompt, quick and accurate work, for the machinery was kept in motion, the paper accumulating at about 250 feet a minute and falling upon the floor. It was necessary to get rid of this paper and slack expeditiously to prevent as little of the paper being spoiled as was possible, and it was this work which the plaintiff was doing, or attempting to do, when he was injured.

When the machinery was in motion and the rollers revolving there was a tendency to draw the waste paper toward the revolving rollers. What caused this dangerous tendency does not appear very clearly, and perhaps it is not very important; that it existed is scarcely disputed. The plaintiff was not informed of this danger, and did not know of it until his hand was drawn in between the rollers.

I think it cannot be said, as a matter of law, that this danger was obvious and the risk assumed by the plaintiff. While he must have known that if his hand was caught between the rollers it would be injured, yet the jury were warranted in finding that this dangerous tendency to draw the material toward the roller was unknown to the plaintiff, and that reasonable care for the safety of this boy required the defendant to warn him of its danger. In this respect the case differs from those cited and relied upon by my brother, NASH, and, as I think, comes within the class of cases like *Wyman v. Orr* (47 App. Div. 136) and *Wells v. Celluloid Co.* (175 N. Y. 401).

As I view it, the case was one for the jury. The questions were submitted to them with clearness and accuracy by the learned trial judge, and they having found upon these questions adversely to the defendant, their verdict ought not to be disturbed. The other

App. Div.]

Fourth Department, March, 1906.

points urged upon our attention by the defendant's counsel have not been overlooked, but none of them, I think, is such as to warrant granting a new trial.

The judgment and order appealed from should be affirmed.

All concurred, except NASH, J., who dissented in an opinion, and WILLIAMS, J., who dissented on the ground that the finding of the jury that the risk was not assumed is contrary to the evidence.

NASH, J. (dissenting):

The plaintiff, a boy about sixteen and one-half years of age, while at work as "backtender" of a machine used in the manufacture of paper in the defendant's mill, had his hand drawn in between two rapidly revolving iron rollers and injured, so that amputation at the wrist became necessary.

The machine was some seventy-five feet in length, consisting of two sets of horizontal metal rollers, one set known as the "drier" rolls and the other as the "calender" rolls. The drier rolls were hollow, three feet in diameter, filled with steam for drying paper, and arranged eight on the bottom row and seven on top. The paper is fed into the drier rolls at one end known as the wet end, being then of a pulpy consistency, and run over the drying rolls is dried out, and is then perfect paper except that it is required to be smoothened or calendered.

The calender rolls consisted of ten steel rollers set up in a vertical stack, one directly above another and resting on the next one below it of its own weight. These rollers were about eight feet long, larger at the bottom and smaller toward the top of the stack. The bottom roller was fifteen inches in diameter, the one next above twelve inches, etc. The place of contact between the two bottom rollers, called the "pinch," was some thirty inches above the floor. The calender stack stood at the end of the drier rolls and was placed so that there was a space of two and one-half feet between the drier and calender rolls. In the operation of the machine the paper was dried out by the drier rolls, and ran between the last drier roll and the "spring roll," so called, up between the two top calender rolls and down to the bottom of the calender stack by passing round back and front respectively of each alternate roll. After passing

through between the two lower calender rolls the finished paper ran upon a reel or winder.

In the ordinary operation of the machine the paper often broke at a point between the drier and calender rolls. The breaking of the paper at this point was of frequent occurrence, two or three and often more times a day. When this happened the paper coming over the driers would wind around the last roll and accumulate. In order to start the sheet through the calender rolls again the operator would take a knife, go into the space between the drier and calender rolls, and cut the paper on the last drier, cutting it the entire length of the roll. When this was done the paper would run down into the space between the drier and calender rolls and accumulate on the floor. Then, to get it away, he would take hold of some part of the paper which had accumulated on the floor and shove it between the two bottom calender rolls. The rolls would take up the slack and carry it off. This waste paper would then drop on the floor in a pile on the other side of the calenders. When the slack was taken up and the paper was running clear from the bottom drier rolls to the bottom calender rolls the operator would snap the paper off between the drier and calender rolls, carry the end up to the top of the calender rolls and put it between the top rolls. An operator on the opposite side of the calenders would see that the paper came back through the next pair of rollers, and so on until it was running regularly.

Three men usually operate the machine. The machine tender has charge of the machine. His usual place of duty is at the wet end of the machine. There is then the backtender, who assists the machine tender, and whose duty it is usually to handle the paper when it breaks at the calender end of the machine. The other man is known as the "third hand."

Prior to the time of the accident the plaintiff had been working in the plant about eleven months. He was first employed in the pulp mill. After working in that department a month and a half he went to work oiling machines. Then he was engaged in painting about the factory; from that back to oiling again about a month and then he was employed as third hand on this machine. He had worked in that position about three months next prior to the accident.

On the day of the accident the backtender did not come to work,

App. Div.]

Fourth Department, March, 1906.

and Adams, defendant's superintendent, directed Flay, the foreman, to have the plaintiff do the work for that day, which Flay did, and had another employee take third-hand work.

The plaintiff was the only witness as to the manner in which the accident occurred. The paper broke several times the day of the accident. His testimony is: "Flay (told me to) go and do the backtending. \* \* \* I then stayed around all day that day until it broke, and Mr. Brown (the machine tender) did the backtender's work. The paper broke at the calenders and I went to do it. That day I did the same as third hand work. I stayed there until the paper broke at the calenders. I went to do it and Mr. Brown did it. He fixed the paper so it would run. It broke later and he did it every time until about \* \* \* half-past four it broke, and he was down cleaning up the screens, and I went in to do it, and I cut it off and it fell on the floor, and I went to stoop over to pick it up, and I had my hand on it, and all at once it went in itself. I had not put the paper through there before. \* \* \* I went and cut it off, and I had to jab at it lots when I come to cut it off, and it all piled on the floor and I put my right hand down to grab it and put my other hand on the top to shove it in, and all at once it went quick just so fast, and pulled my hand in so I didn't know where it went. I put my right hand in it. There was paper under my right hand and paper over my right hand. My left hand was on top of that that just came out. \* \* \* It piled up fast. When my hand went in with the paper it went between the rollers. I guess the two bottom \* \* \* calender rolls."

The complaint states a cause of action under the Employers' Liability Act (Laws of 1902, chap. 600). It alleges the giving of the notice to the defendant required by the act, and that the defendant caused the ways, works and machinery of the mill to be and remain defective, because of which and the absence of instructions in regard to the danger thereof, the plaintiff was injured.

The court held that the plaintiff had failed to prove a cause of action under the Employers' Liability Act, but that the complaint sufficiently stated a cause of action at common law.

The question submitted to the jury was whether the defendant was negligent in failing to properly instruct the plaintiff in operating the machine as backtender.

No instructions were given to the plaintiff at the time he was directed to do the work of a backtender. It was known to the superintendent that the plaintiff had been familiar with the operation of this machine for some eleven months. As oiler he was over and around every part of the machine a month at a time for two months. His work as oiler and third hand made him acquainted with the duties of a backtender. While at work as oiler and third hand he had seen the paper break between the rolls several times daily; saw the paper pile upon the floor and the operation of cutting the paper from the drier roll and running the waste through the bottom calender rolls. He says he did not himself attempt to do that part of the work, on the day he was put at backtending, until about half-past four in the afternoon, but it broke several times during the day and was fixed, he says, by Brown. Brown says that he put the paper through the calenders several times the day of the accident; that Makin tried several times during the day to cut the paper from the dry roll and he (Brown) had to help him because, he says, "I could get it off quicker;" that Makin saw him cut the paper and start it through the calenders. Brown, who was called as a witness for the plaintiff, says that it requires skill to do the work of cutting the paper off from the dry roll and putting it through the calenders without getting caught; that the only particular danger is in getting the hands of the operator caught in the calender rolls; that there is no danger attendant upon cutting off the paper from the dry roll. The machine at this part is simple in operation and the danger is apparent. Every one knows the result of putting the hand between two rapidly revolving heavy steel rollers. The plaintiff on his cross-examination testified: "Q. Why did you go in between the dry rolls and the calender rolls on that day? A. Mr. Brown wasn't there and I was supposed to be backtender. \* \* \* Q. How did you know, nobody had told you, that was the thing to do? A. The foreman told me to be backtender. Q. How did you know what a backtender had to do? A. I just seen them monkeying around there; I was not doing that at the time I was hurt; I had hold of the paper. Q. You were doing what you had seen others do? A. Yes, sir. Q. The same thing? A. Yes, sir. Q. And that is the reason you went in to do it, what you had seen Mr. Brown do? A. Yes, sir; I had never seen anybody else

App. Div.]

Fourth Department, March, 1906.

put the paper through there besides Mr. Brown. Q. How did you know the paper had to go through there? A. I knew they jabbed it because when I was oiler I often saw them shoving their piles, putting it in. Q. You had seen them when you were oiling? A. Yes, sir; I hadn't seen them as third hand. Q. When you went to work as backtender from what you had seen them do when you were oiling you knew the paper had to go through? A. I knew it had to go through; I didn't know how it had to go through; I didn't take any particular notice how they did it; I know they pushed it or something. Q. You knew they put it between these rolls? A. Yes, sir. Q. So that was what you were doing? A. That is what I tried to do. Q. That is what you were trying to do at the time? A. What I tried to do; yes, sir. Q. And that was the time you got your fingers pinched? A. Yes, sir. \* \* \* Q. How did you know it had to go through the bottom pinch at the time? A. Because I had seen them put it through. Q. Seen who put it through? A. The backtenders. Q. While you were working as what? A. Oiling around. Q. And as third hand? A. I might have seen them once or twice. Q. You knew that was the thing to do when the paper broke, did you? A. Yes, sir. Q. After the paper broke and after you got up there what did you intend to do with the paper? A. Try to put it through the top. Q. You knew that was what they did with the paper after it broke? A. Yes, sir. Q. So you were just getting ready to go ahead and do those things, is that it? A. Yes, sir."

It thus appears that he had often seen this particular work done, knew the whole operation and in the absence of Brown attempted to perform it. No oral instructions would have given him any further information than he already had as to the manner of doing the work and the dangers attending its performance. Under the circumstances it cannot be held that the master was negligent in failing to give instructions. (*Crown v. Orr*, 140 N. Y. 450; *White v. Wittemann Lithographic Co.*, 131 id. 631; *Buckley v. G. P. & R. M. Co.*, 113 id. 540; *Ogley v. Miles*, 139 id. 458.)

In *Crown v. Orr*, the plaintiff, an infant, was directed to place a hood on a planing machine, in place, which was about eight inches in front of the knives. In doing this his hand was caught by the knives and he was injured. He had not been employed to operate this

machine. It was held that, assuming plaintiff received the order as testified to, this and the failure to give instructions did not charge the defendants with personal negligence; that plaintiff had full opportunity to observe the manner of handling the hood and placing it upon the machine and it was not negligence to request him to put it in place without instructions, especially as he asked for none, and showed in no way that he was not familiar with the method of doing it; that if the operation was especially dangerous without instructions, the danger was obvious and he was not bound to obey the order, and in doing that he took the risks.

The plaintiff here was put at backtending, one of the duties of which was to cut the paper from the drier when it broke, and put it through the calenders. It seems, however, that the plaintiff was not required to do this particular part of the work. Through the day until the plaintiff attempted it, this part of the work was done by Brown, the machine tender. The plaintiff was told to go and do the backtending; he says, "I then stayed around all day that day until it broke, and Mr. Brown did the backtender's work. The paper broke at the calenders and I went to do it. That day I did the same as third hand work. I stayed there until the paper broke at the calenders, I went to do it and Mr. Brown did it. He fixed the paper so it would run. It broke later, and he did it every time until about \* \* \* half-past four it broke, and he was down cleaning up the screens, and I went in to do it."

In *Ogley v. Miles*, the plaintiff, a boy sixteen years of age, was operating a buzz saw; his hand came in contact with the saw, and he was injured. He had only been engaged in the work for the defendants two days, but had experience in other factories and understood the practical working of the machine. It was held that the omission to give the plaintiff oral information of the dangerous character of the buzz saw did not make the defendants liable.

In *White v. Wittemann Lithographic Co.* it was held that in an action to recover damages for injuries received by an infant who is *sui juris*, from coming in contact with machinery while in defendant's employ, proof that the employer omitted to instruct the employee as to using the machinery did not impose liability upon the former, provided the latter knew by experience or observation the nature of the machinery and the danger to be apprehended from it,



App. Div.]

Fourth Department, March, 1906.

About a month before the accident to the plaintiff, two additional drying rolls were put into the machine, which narrowed the space between the drying and calender rolls from five and one-half to two and one-half feet.

It appears that after this space between the rolls was narrowed, the paper which accumulated upon the floor when broken, frequently filled up the space between the rolls, and occasionally caught of itself and went between the calender rolls. This the plaintiff swears he had not observed prior to the accident.

The point is made that the defendant was negligent in not instructing the plaintiff that paper would go in between the calender rolls of itself.

It was not shown that this rendered the operation of cutting the paper and putting it through the calender rolls more dangerous than before, or that there would have been the slightest difficulty in extricating one's hands from the paper. Brown says that if the paper running on the floor is not kept down with the feet while cutting the paper, it will sometimes catch and go in the calenders itself and start running through; it is liable, he says, to do that, whether you do the best you can with your legs to keep it in front of you. But his testimony is, that the particular danger is to keep the hands from getting caught in the calenders. It was the only danger he knew of. It was apparent that, if the paper was allowed to accumulate and pile up against the calender, it was liable to be drawn in. The paper going in between the calenders of itself was not the occasion of the accident. The plaintiff, after stating that he cut the paper and it fell on the floor, testified: "Q. What were you trying to do at the time you picked up the paper? A. I was going to put it in. Q. In between the calenders? A. Yes, sir; I didn't pick it up; I was just going to pick it up. I had one hand in the folds and the other hand on top. My hands came in contact with the paper. I was not shoving it towards these calender rolls. Q. What were you doing with the paper at the time? A. Just got hold of it, trying to push it in. Q. You were just trying to push it in? A. No, sir. Q. What do you mean? A. I just took hold to try to push it in. Q. You knew it had to go through there then? A. Yes, sir. Q. And you knew it was your business to put it through there? A. Yes, sir. Q. And so that is what you were

just getting ready to do? A. Yes, sir." From this it appears that the plaintiff had his hands in and upon the paper for the purpose of putting it between the calenders.

If there was force sufficient of itself to draw the paper in, liability of getting the hands caught was no greater than if the paper was being pushed in by hand. There was no evidence that the paper going in of itself had ever caused an injury to any one. If there was danger of injury from this cause it was unknown to every one employed about the machine; unknown to the defendant, and, therefore, the injury to the plaintiff was the result of an accident which could not have been foreseen.

In *Hickey v. Taaffe* (105 N. Y. 26) the plaintiff, a young girl about fourteen years and seven months old, was employed by defendant in his laundry to feed collars to an ironing machine. She was instructed how to do the work, but was not instructed as to the danger of the employment. She worked the machine safely, however, for six weeks, during which she became acquainted with and fully appreciated the danger to be apprehended from allowing her hand to be caught between the rollers of the machine, which was of a kind ordinarily used. There were several of the kind in use in the laundry, and no operator or feeder had ever been caught. After one end of the collar had passed through the rollers, in endeavoring to straighten out the other end, which lapped over, one of the plaintiff's fingers was caught in the button hole and, being unable to extricate it in time, her hand was drawn between the rollers and badly crushed and burned. In an action to recover damages it was held that the defendant was not liable, conceding that there was a neglect of duty on the part of the defendant in not advising plaintiff of the dangers to be apprehended; the injury did not occur on account of any act done or omitted on her part because of want of knowledge or appreciation of the dangers, but was the result of an accident which could not have been foreseen and for which no one was at fault.

Within the principles of that case, as well as the rules generally applicable to the case here, the motion for a nonsuit should have been granted.

The judgment should be reversed.

Judgment and order affirmed, with costs.

RICHARD BRANSON, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Fourth Department, March 7, 1906.

**Watercourse — duty to keep artificial ditch unobstructed — owner liable for want of reasonable care — charge.**

A railroad company, which has built a ditch to collect waters coming upon its land from the premises of adjoining landowners and has built a culvert to conduct said waters under the railroad embankment, is bound to use reasonable and ordinary care to keep such ditch and culvert unobstructed, and is liable if accumulated waters set back upon adjacent lands causing damage.

It makes no difference that the water is collected in an artificial channel or that the water came from the lands of persons other than the plaintiff. A landowner may not collect water into an artificial channel upon his lands and discharge it upon the lands of another in such volume or quantity in excess of the natural drainage as to cause injury.

Charge as to liability of defendant approved.

APPEAL by the defendant, The New York Central and Hudson River Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Onondaga on the 26th day of January, 1905, upon the verdict of a jury, and also from an order entered in said clerk's office on the 4th day of February, 1905, denying the defendant's motion for a new trial made upon the minutes.

The action was brought to recover damages sustained by plaintiff for injuries to his crops and lands by water setting back upon them through the failure of the defendant to keep open a ditch maintained upon its lands into which the waters from its lands and other lands were drained and collected.

*Le Roy B. Williams*, for the appellant.

*S. Gay Daley*, for the respondent.

KRUSE, J.:

The plaintiff owns four acres of land which lie between the defendant's railroad, known as the Chenango Valley railroad, and the Erie canal, about three miles east of Syracuse, the canal being

on the south and the railroad on the north side. The canal and railroad run east and west, substantially parallel with each other. The natural slope of the land is east and north toward the railroad. For many years a ditch has existed on the defendant's right of way on the south side thereof, into which the waters from the railroad lands, as well as from other lands lying south of the ditch, have drained, including the plaintiff's lands and others lying to the west of his lands. Upon the plaintiff's lands were four ditches extending from the towpath of the canal to the railroad ditch. On these lands to the west were ditches which drained into the railroad ditch. There were also natural springs upon these lands to the west, as plaintiff claims, which drained into this railroad ditch. Before the Chenango Valley railroad was built these waters ran north to the main tracks of the New York Central, which are north of the Chenango Valley tracks. The evident purpose of this railroad ditch was to take care of the waters which would naturally come upon the railroad lands, and that included these waters which drain and flow toward the railroad from the south. The water in this railroad ditch had an unobstructed flow east until about eighteen years ago a branch railroad or switch was built, which connected with the main line about a third of a mile east of plaintiff's four acres and extended in a southwesterly direction, intersecting this ditch. A culvert was built there for the water, but it is contended by the plaintiff that it was too small; that the material was decayed, and the defendant negligently permitted it to become filled up, and so obstructed the flow of the water that it set back and eventually overflowed the plaintiff's said four acres and other lands which he occupied as lessee, lying to the east of his four acres and west of the culvert, destroying his crops and injuring his land, which was low muck soil and adapted to raising garden vegetables.

At the close of the evidence the defendant moved for a nonsuit on the ground that no natural watercourse was shown; that there was no prescriptive right in the plaintiff or any other person to drain over the defendant's land; that the ditch in question was the defendant's private ditch which it had the right to obstruct or alter as it saw fit, and on the ground generally that no negligence had been shown. The motion was denied and the defendant excepted.

Upon the question of the liability of the defendant the trial

judge charged the jury as follows: "The sole question which I am going to submit to you in this case as bearing on the defendant's liability is whether it was or was not negligent in the manner in which it conducted or allowed this stream to run under the culvert beneath the tracks of the Chenango Valley railroad. Whether this water running in this railroad ditch was a natural stream, or whether it was the drainage from the defendant's land and from the land of Finn, whether it ran naturally past the plaintiff's premises, or whether being collected above by the defendant it was brought by it past the plaintiff's premises, in either case it was bound to use reasonable care so that it should pass beneath these tracks of the Chenango Valley road without doing injury to the plaintiff or to others. In either event the defendant had no right voluntarily to dam the stream at the point where this culvert goes beneath the tracks or negligently allow it to be dammed at that point; and if it did so dam it, voluntarily or negligently, it is liable for the injury which the water so dammed back did to the property of the defendant's neighbors.

"The defendant (and I wish you to understand this clearly) owed no duty whatever with regard to any water which might have drained off of Branson's land. As to that water it had done all that it was in any way required to do (perhaps more than it was required to do) when it permitted it to run into its ditch. As to that water it owed no obligation whatever to the plaintiff. It is only with regard to this other water — this natural stream, if it is a natural stream, or this drainage, if it is drainage, collected from a point east of the plaintiff's premises and brought down or allowed to run down past the plaintiff's premises, that the defendant owed any duty to the plaintiff, and what that duty is I have told you. It is to use reasonable care and prudence to permit that water to pass beneath the Chenango Valley road in its old course. If it failed to do that duty, as I have said it is liable for the damages which that failure caused. The limit of its duty is care, or at least the plaintiff in this action does not ask that any other rule should be enforced.

\* \* \* It does not warrant that the culvert beneath the Chenango Valley tracks shall at all times and in all events be free and unobstructed. It simply is bound by the law to use diligence in that respect; to use that care and prudence which an ordinary prudent

man under the like circumstances would have used in view of all the facts known to the parties, in view of all the surroundings, in view of everything else which has been proved before you and which would enable such a man to determine what care he owed with regard to this water."

At the close of the main charge the defendant's counsel excepted to the statement that the defendant was bound to use diligence, claiming that it was only bound to use reasonable and ordinary care such as any property owner would use with reference to maintaining a culvert on his own land, which the court charged and withdrew the statement about diligence, saying that the defendant was bound to use ordinary care.

We think the exception to the denial of the motion for a non-suit was not well taken, and that the rule laid down by the learned trial justice in his charge for determining the defendant's liability was as favorable to the defendant as the circumstances of the case warrant.

The fact that this water reached this culvert through an artificial channel instead of a natural watercourse, does not absolve the defendant from liability, neither does the fact that the water, or some of it, came from the lands of others. (*Wickham v. Lehigh Valley R. R. Co.*, 85 App. Div. 182.) As has been stated, the object of this ditch was to collect the waters coming upon these railroad lands, and having done so the defendant could not intentionally or by permitting its flow to become obstructed through its inattention and want of care, cause this unnatural and unusual accumulation of water to be cast or set back upon the plaintiff's lands without subjecting itself to liability for the damages thus done him.

The general rule is, that an owner may not collect water into a ditch or artificial channel upon his lands and discharge it upon the lands of another in such volume or quantity in excess of the natural drainage as to injure him. (*Mitchell v. N. Y., L. E. & W. R. R. Co.*, 36 Hun, 177; *Noonan v. City of Albany*, 79 N. Y. 470; *Mairs v. Manhattan Real Estate Association*, 89 id. 498, 505; *Wickham v. Lehigh Valley R. R. Co.*, *supra*.)

We think that none of the refusals to charge as requested by the defendant presents reversible error. As regards the refusal to charge that the plaintiff had no right to drain into the defendant's

App. Div.]

First Department, March, 1906.

ditch, the jury were expressly charged that defendant owed no duty to plaintiff in respect to such water, and besides it cannot be said from the evidence as a matter of law that he had no such right. The proof tends to show that he, as well as the owners above him, had at least a license to do so, and a similar request as to these owners was likewise properly refused, as well as those respecting the duty of such owners to keep open this ditch. We think, under the circumstances of this case which the jury were warranted in finding from the evidence, that duty rested upon the defendant as between it and the plaintiff.

The judgment and order appealed from should be affirmed, with costs.

All concurred.

Judgment and order affirmed; with costs.

---

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WILLIAM H. MICHALES, Respondent, v. JOHN F. AHEARN, as President of the Borough of Manhattan, in the City of New York, Appellant.

First Department, March 9, 1906.

**Municipal corporation — mandamus to compel reinstatement of superintendent of sewers of borough of Manhattan — said office not created by charter or under power conferred thereby — demurrer to alternative writ sustained — present incumbent of office not necessary party.**

The only heads of bureaus in the city of New York entitled to immunity from removal "until he has been allowed an opportunity of making an explanation," under the provisions of section 1543 of the charter of Greater New York, are the heads of bureaus specifically created by the charter, or created under power conferred by it.

Hence, when the alternative writ of mandamus whereby the relator, the superintendent of sewers in the bureau of sewers in the office of the president of the borough of Manhattan, seeks reinstatement on the ground that he was dismissed without a hearing, fails to allege that he was at the head of a bureau created by the charter, or by an official given authority by the charter to create bureaus, it is subject to demurrer, as failing to state facts sufficient to show a right to a peremptory writ.

There is no bureau of sewers established by the charter or power given which authorizes the president of the borough of Manhattan to create a bureau of sewers in his department.

Legislation affecting the department of sewers in the city of New York considered.

The present incumbent of said office, though a proper party to a writ of mandamus to compel the reinstatement of one removed, is not a necessary party.

PATTERSON and LAUGHLIN, JJ., dissented.

APPEAL by the defendant, John F. Ahearn, as president of the borough of Manhattan, in the city of New York, from an interlocutory judgment of the Supreme Court in favor of the relator, entered in the office of the clerk of the county of New York on the 19th day of July, 1905, upon the decision of the court, rendered after a trial at the New York Special Term, overruling the defendant's demurrer to an alternative writ of mandamus.

*Theodore Connolly* and *William B. Crowell*, for the appellant.

*Tompkins McIlwaine*, for the respondent.

INGRAHAM, J.:

The relator presented a petition to the Supreme Court alleging that on or about the 1st day of January, 1902, he was duly appointed to the position of superintendent of sewers for the borough of Manhattan, city of New York, by the then president of the said borough; that he thereupon accepted the said position and duly qualified and has duly performed the duties of that position up to the 4th day of January, 1904; that on the 4th day of January, 1904, the relator was ejected from the said position by persons claiming to act under the authority of the new president of the borough of Manhattan of the city of New York, the defendant in this proceeding; that in the office of the president of the borough of Manhattan there is the office of the commissioner of public works and that in the office of the commissioner of public works there were and had been at all times in the petition mentioned numerous bureaus, among which was the "Bureau of Sewers;" that there was a chief of said bureau of sewers who was designated as the "Superintendent of Sewers;" that no charges had ever been preferred against the relator, nor was he allowed an opportunity of making an explanation concerning his removal, and that such removal



App. Div.]

First Department, March, 1906.

was contrary to the Constitution of the State of New York and the Civil Service Law, the rules made thereunder by the municipal civil service commission and the provisions of the charter of the city of New York. On this petition an alternative writ of mandamus was granted. The defendant demurred to the writ upon the grounds, *first*, that there was a defect of parties, and, *second*, that the writ does not state facts sufficient to constitute a cause of action.

I do not think that the present incumbent of the position appointed to fill the position from which the relator was removed is a necessary party to this proceeding to reinstate the relator. While it may be that the present incumbent could be made a party as interested in the result of this proceeding, his presence is not at all essential to a complete determination of the question at issue between the relator and the defendant, the appointing officer. If the relator's removal was illegal, the final order reinstating him would be a command to the appointing officer; but the relator could obtain no relief in this proceeding against the person who has been appointed to the position from which he had been removed.

A case in which a veteran applies for a mandamus, where a summary proceeding by way of mandamus is given where he has been denied his right to priority of appointment, does not apply to a case like the present; for in such a case there was a vacancy to which an appointment was duly made, in violation of the right of a veteran to priority to appointment; and in determining the question there is involved the right of the appointee to the position to which he had been appointed—and in such a proceeding the appointee is entitled to be heard. But in this case the relator was duly appointed and in office. If his removal was illegal, he has never been deprived of his office, and this application is to enforce his right to continue in the office from which he was illegally removed. The person appointed in his place, if he was illegally removed, has no right to the office and never had a right to it. If the relator's contention is correct, he still holds the position and is entitled to its emoluments, and this proceeding is to enforce that right. With the validity of the appointment of the person who has taken his place, he has no concern. (See *People ex rel. Corkhill v. McAdoo*, 98 App. Div. 312.)

The second question is as to whether the alternative writ states

facts sufficient to entitle the plaintiff to a peremptory writ. The relator relies upon section 1543 of the charter of New York (Laws of 1901, chap. 466), which is as follows: "The heads of all departments and all borough presidents (except as otherwise specially provided) shall have power to appoint and remove all chiefs of bureaus (except the chamberlain), as also all clerks, officers, employes and subordinates in their respective departments, except as herein otherwise specially provided; without reference to the tenure of office of any existing appointee. But no regular clerk or head of a bureau, or person holding a position in the classified municipal civil service subject to competitive examination, shall be removed until he has been allowed an opportunity of making an explanation."

The relator's right to reinstatement must depend upon his holding the position of the head of a bureau within this section of the charter. The alternative writ alleges that on or about the 1st day of January, 1902, the relator was duly appointed to the position of superintendent of sewers of the borough of Manhattan, city of New York, by the then president of the said borough, thereupon accepted the said position and duly qualified; that "in the office of the President of the Borough of Manhattan there is the office of the Commissioner of Public Works, and that in the office of the Commissioner of Public Works, there are, and have been at all the times hereinafter mentioned, numerous bureaus, among which is the 'Bureau of Sewers;' that there is a chief of said 'Bureau of Sewers' and said chief is designated as the 'Superintendent of Sewers;'" and then follows a statement as to the duty of the relator as such superintendent.

This provision of the charter, so far as it relates to the head of a bureau, was included in the charter of 1873 (Laws of 1873, chap. 335, § 28), in the Consolidation Act (Laws of 1882, chap. 410, § 48) and in the New York charter of 1897 (Laws of 1897, chap. 378, § 1543) in substantially the same form as in the present charter. By each of those charters certain bureaus were expressly created. Under the charter of 1873 (Laws of 1873, chap. 335, § 28) no regular clerk or head of a bureau could be removed "until he has been informed of the cause of the proposed removal, and has been allowed an opportunity of making an explanation," and it was held by the

App. Div.]

First Department, March, 1906.

Court of Appeals in the case of *People ex rel. Emerick v. Board of Fire Comrs. of N. Y.* (86 N. Y. 149) that this provision related only to the heads of those bureaus established by the charter, and not to bureaus established by the departments without legislative authority merely for administrative purposes, and this principle was reaffirmed in the case of *People ex rel. Cuming v. Koch* (2 N. Y. St. Repr. 110; affd. without opinion, 103 N. Y. 650). In the present charter (Laws of 1901, chap. 466) we find that there are created separate bureaus in several departments. Thus there are five bureaus in the finance department (§ 151); three in the law department (§§ 258, 259, 260); three in the fire department (§ 727); two in the health department (§ 1179); three in the tenement house department (§ 1328), and the bureau of buildings in the office of each borough president (§ 405). Except, however, in relation to the law department (§ 258) and the tenement house department (§ 1328), there is no authority in the charter granting power to the heads of departments to create additional bureaus, and if the rule adopted in the cases above cited is to be applied, and the provision of section 1543 of the charter held to apply only to the bureaus specifically created by the charter, or created under the power conferred by it, it would appear that the relator is not the head of a bureau and is not protected from removal. By section 96 of the charter of 1897 (Laws of 1897, chap. 378) a department of sewers was created, the head of which was called the "Commissioner of Sewers," who was to be appointed by the mayor. (§ 555.) He was given cognizance and control of all subjects relating to the public sewers and drainage of the city. (§ 556.) No bureaus, however, were created in his department, but authority was given to him to create bureaus therein. (§ 458.) By section 389 of the charter of 1901 all powers theretofore vested in the commissioner of sewers were vested in the city of New York, "and as matter of administration devolved upon the president of the borough within which is situated the territory to which or to the official representatives of which said powers and duties heretofore appertained, to be by him executed in accordance with the provisions, directions and limitations of this act," and by section 390 of said charter the commissioner of sewers, as constituted by the charter of 1897, was required to turn over and deliver to the several borough presidents of the various boroughs included

within the city of New York, so far as the same should apply to the borough of which each was president, all maps, plans, etc., relating to sewers. By section 383 of the charter the president of a borough was authorized to appoint and at pleasure remove a commissioner of public works for his borough, who may discharge all of the administrative powers of the president of the borough relating to streets, sewers, public buildings and supplies conferred upon him by the act. He was given power to appoint a secretary and such assistants, clerks and subordinates as he might deem necessary, if provision is made therefor by the board of estimate and apportionment and the board of aldermen; and such secretary, assistants, clerks and subordinates were to hold office at the pleasure of the president, subject to the provisions of the civil service laws. He was then given cognizance and control of all subjects relating to the public sewers and drainage of his borough. His power to appoint and remove all of his subordinates is unlimited, except so far as he should be restrained by the civil service laws. There is established a bureau of buildings in the office of each borough president (§ 405), the president of the borough being authorized to appoint a superintendent of buildings for the borough, and the bureau of buildings is the only bureau authorized by the charter in the office of the borough president. There is no bureau of sewers thus established by the charter, and no authority that I can find which authorizes the president of the borough to constitute a bureau of sewers in his department. The powers vested in the commissioner of sewers under the charter of 1897 were vested in the city of New York. (§ 389). Thenceforth whatever power existed in the commissioner of sewers under the charter of 1897 to create separate bureaus was thus vested in the city, and if it was sought to exercise powers establishing a bureau it would have to be done by the legislative body of the city (the board of aldermen). The alternative writ of mandamus does not allege that there has ever been created in the office of borough president, either by the board of aldermen, or by any other lawful authority, a bureau of sewers. The alternative writ alleges that in the office of the president of the borough of Manhattan there is the office of the commissioner of public works, and that in the office of the commissioner of public works there are and have been at all times thereafter mentioned numerous bureaus,

App. Div.]

First Department, March, 1906.

among which is the bureau of sewers, and that there is a chief of said bureau of sewers, and that said chief is designated as superintendent of sewers, and this allegation is admitted by the demurrer. I do not think this allegation is sufficient to sustain this proceeding, because the provision of section 1543 of the charter upon which the relator relies only applies to the heads of bureaus specifically created by the charter, or under its authority, and to entitle the relator to the protection of this provision it is necessary that he should allege that he was at the head of a bureau created by the charter, or by an official who was given by the charter authority to create bureaus. The fact that there was in the office of the commissioner of public works bureaus, of which one was the bureau of sewers, unless such bureau was actually created by the charter, or by an officer authorized by the charter to create bureaus, would not be sufficient to protect the person at the head of such bureau. (*People ex rel. Emerick v. Board of Fire Comrs. of N. Y.*, 86 N. Y. 149.) To entitle the relator to this relief, I think the alternative writ must allege that the bureau of which he claimed to be a member was one established by the charter. There is no allegation that this bureau was established by municipal authority, or that it was established by the president of the borough, or the commissioner of public works. He simply alleges that there existed in the office bureaus. That is not an allegation that bureaus had been established under the provisions of the charter to which the section of the charter upon which he relies applied.

I think the judgment appealed from should be reversed and the demurrer sustained, with fifty dollars costs and disbursements.

O'BRIEN, P. J., and CLARKE, J., concurred; PATTERSON and LAUGHLIN, JJ., dissented.

Judgment reversed and demurrer sustained, with fifty dollars costs and disbursements. Order filed.

ROCHESTER DRY GOODS COMPANY, Plaintiff, v. LOUISE K. FAHY,  
Defendant.

Fourth Department, March 7, 1906.

**Contract** — contract of transferrer of stock that corporate debts will be collected — such contract not for benefit of corporation — when no action by corporation lies thereon — proof of assignment of rights of purchaser not admissible unless alleged in complaint.

When the owner of corporate stock upon transferring to a third person a sufficient number of shares to give a controlling interest, guarantees that the accounts receivable by the corporation will be collected and that certain claims will not be made against the corporation, and agrees to pay to the corporation or to the transferee of the stock the amount of any accounts not collected, etc., or deduct the value thereof from the price set upon the balance of the stock which the transferee has an option to purchase, such promise is personal to the transferee and for his benefit. It is not made for the benefit of the corporation, which, therefore, is not entitled to enforce the promise.

The only standing which such corporation can have in order to enforce such promise would be as assignee of the rights of the promisee, and when no such assignment is alleged and no amendment setting out such assignment is asked, a nonsuit is proper.

Evidence of said assignment is not admissible unless alleged in the complaint. Doctrine of *Lawrence v. Fox* discussed and limited.

MOTION by the plaintiff, the Rochester Dry Goods Company, for a new trial upon a case containing exceptions, ordered to be heard at the Appellate Division in the first instance upon a nonsuit granted at the Monroe Trial Term.

The action was tried in May, 1905, at the Trial Term of the Supreme Court held in the county of Monroe, and at the close of the plaintiff's evidence a nonsuit was directed, to which the plaintiff excepted and presents the only serious question for determination upon this review.

*Henry Adsit Bull*, for the plaintiff.

*George A. Carnahan*, for the defendant.

KRUSE, J.:

The plaintiff is a domestic corporation whose capital stock consists of 400 shares of the nominal or par value of \$100 each. In Feb-

App. Div.]

Fourth Department, March, 1906.

ruary, 1903, it was engaged in the mercantile business in the city of Rochester. The defendant owned a controlling interest in the corporation at that time, and entered into an agreement with one John U. Fraley, by which she sold him sufficient of her shares of stock to give the control to Fraley.

The first contract was made between the defendant and Fraley February 9, 1903, and is preliminary to the succeeding one made February 14, 1903. The name of the plaintiff at that time was the Fahy-Schantz Dry Goods Company, and later it was changed to the Rochester Dry Goods Company. The contracts refer to the plaintiff by its former name. It is evident from these two contracts that Fraley regarded it important to know the amount of the accounts receivable by the plaintiff, as well as the extent of its liabilities, as bearing upon the value of the shares of the capital stock he was about to acquire from the defendant, so that in the agreement of February 14, 1903, which was a final consummation of the negotiations between the defendant and Fraley, the following provision was embodied: "The said Louise K. Fahy does hereby guarantee that the accounts receivable of the Fahy-Schantz Dry Goods Company will be paid to the amount of twenty-five thousand seven hundred forty dollars and fifty-seven cents (\$25,740.57) on or before March 1st, 1904, and does hereby further guarantee to the said John U. Fraley that a certain indebtedness of the Fahy-Schantz Dry Goods Company said to be outstanding on account of contracts and obligations entered into by said company relating to repairs and improvements on certain premises in the city of Buffalo formerly occupied by the Knowles & Gardner Company, and said to amount to between five and six thousand dollars, if the same are legal and enforceable obligations or shall be charged in any way on the Fahy-Schantz Dry Goods Company, then she, the said Louise K. Fahy, will pay the amount thereof to the said Fahy-Schantz Dry Goods Company or to the said John U. Fraley, and as a security of the performance of this obligation, the said Louise K. Fahy does hereby agree to pledge her remaining capital stock in said Fahy-Schantz Dry Goods Company, or to deduct the amount of the said accounts receivable which shall prove to be bad or uncollectible on or before March 1st, 1904, and the amount of said Knowles & Gardner claim, if any, from the value which shall be

placed upon her remaining shares of capital stock in the Fahy-Schantz Dry Goods Company under the appraisal thereof, and covered by the option to purchase the same under said agreement of February 9th, 1903."

There are other provisions in these contracts relating to the management and carrying on of the business, including the execution and delivery of a lease of the premises then occupied by the company. It was admitted on the trial that the accounts receivable remaining unpaid amounted to the sum of \$8,938.86, and that there had been paid by the plaintiff on the Knowles & Gardner obligations the sum of \$4,843.27, of which the defendant paid on March 2, 1903, the sum of \$2,000, and this action was brought by the plaintiff to recover the amount unpaid on the accounts receivable and the balance unpaid on the Knowles & Gardner obligation, it being contended by the plaintiff that it was entitled to recover under the provisions contained in this contract of February 14, 1903, above referred to, and that the promise therein contained relating to these two claims inured directly to its benefit, and that an action was maintainable thereon by it without any assignment thereof or the right thereunder from Fraley to it, although the plaintiff claimed upon the trial that it also had an assignment from Fraley of his right and claim thereunder, and offered to make proof thereof, which was excluded. The trial court excluded the proof upon the ground that the assignment had not been pleaded and the action was not brought upon any such theory, but suggested an amendment to the pleadings, which suggestion was not taken by the plaintiff, and its counsel stated that he did not care to take chances on any further amendment of the pleadings, but asked to introduce the evidence upon the pleadings as they then stood, stating further that the plaintiff was not suing on the assignment, but in its own right, and the assignment was in confirmation of that. Thereupon a motion for a nonsuit was made, which was granted, plaintiff excepting thereto, as well as to the refusal to admit the assignment in evidence. The exceptions were ordered to be heard here in the first instance, and the plaintiff now asks that these exceptions be sustained and that a new trial be ordered.

We think that the learned trial court correctly disposed of this case. As regards the exception to the refusal to admit the assign-



App. Div.]

Fourth Department, March, 1906.

ment from Fraley, it is sufficient to say that the complaint is not based upon an assigned cause of action, and the plaintiff does not seek now to recover upon any such theory, and that leads us directly to the only question which requires serious consideration

Taking the most favorable view of the case in all of its aspects, and giving the most favorable inferences to the plaintiff permissible from the evidence in this case, as we are required to do upon this review, the plaintiff having been nonsuited at the trial, we are unable to see any ground upon which this action can be successfully maintained.

The plaintiff contends that the promise contained in this provision of the contract was made for the benefit of the plaintiff; that although it was not nominally a party to the contract between the defendant and Fraley in the first instance, yet when it ratified and adopted the contract, which it claims to have done, it acquired a complete and irrevocable right therein, enabling it to maintain in its own name and right an action upon this promise.

The plaintiff invokes the doctrine of *Lawrence v. Fox* (20 N. Y. 268) to uphold its claim and further contends that, irrespective of the rule laid down in that case, this action is maintainable, seeking to bring itself within that class of cases where one person contracts with another, assuming to act for a third person but without authority, permitting the latter to ratify and adopt such contracts, as in the case of contracts made by promoters in contemplation and on behalf of corporations to be formed; in such cases it has been held the corporation when organized may adopt the contract and subject itself to liability thereunder. (*Mesinger v. Mesinger Bicycle Saddle Co.*, 44 App. Div. 26.)

The difficulty with this position is, that Fraley did not act, nor did he assume to act, for the plaintiff. He acted for himself and the contracts were made for his own benefit. There was no obligation attempted to be imposed upon the plaintiff, and it never assumed any. This contract was not made for the benefit of the plaintiff, as I view it; this guaranty and these promises were made for the benefit of Fraley. He was interested in the value of the shares of stock which he was acquiring, not the plaintiff; the plaintiff was not interested in any way in the transaction. It is true that the payment by the defendant to the plaintiff of these moneys

would, to that extent, have increased its assets, but the only purpose of this was to make the stock as valuable as the defendant claimed it to be, and to indemnify and make whole Fraley for any loss. Can it be contended that differences, arising out of this contract between Fraley and the defendant, could not have been adjusted by them without the intervention of the plaintiff, or that this contract could not have been changed or modified by Fraley and the defendant, or that Fraley could not have released and discharged the defendant from any claims thereunder? And yet if plaintiff is right, this could not have been done.

It is, however, contended with great earnestness that the doctrine of *Lawrence v. Fox* applies to this case. It is needless to go into the history of the rule of that case or discuss the many cases called to our attention where the rule has been applied or rejected. Broadly, but not precisely stated, it is a binding promise made by one to another for the benefit of a third person. To be enforceable, however, by such third person it must not only appear that the promise shall be for the benefit of the third person, but its direct object must have been to benefit him, a mere incidental benefit is not sufficient, and besides he must have some legal or equitable interest in its performance, or as Mr. Justice INGRAHAM states in *Haefelin v. McDonald* (96 App. Div. 222): "There must be a legal or equitable obligation or duty on the part of the promisee to the third party for whose benefit the promise was made. That it would be a benefit to the promisee to have such a covenant enforced, or that there was a moral obligation of the promisee to the third party for whose benefit the promise was made, is not sufficient to allow the third party to maintain an action to enforce the promise." To the same effect is *Hurd v. Wing* (76 App. Div. 506, 508).

The theory of the cases being, as is said in American and English Encyclopædia of Law (7 Am. & Eng. Ency. of Law [2d ed.], 107), that such an obligation so connects him with the contract as to be a substitute for any privity with the promisor.

The rule was elaborately amplified and clearly stated in *Vrooman v. Turner* (69 N. Y. 280), and quoted as late as the present year in the Court of Appeals (*Pond v. New Rochelle Water Co.*, 183 id. 330, 336), and I cannot forbear quoting it here: "To give a third party who may derive a benefit from the performance of

App. Div.]

Fourth Department, March, 1906.

the promise, an action, there must be, *first*, an intent by the promisee to secure some benefit to the third party, and, *second*, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally. It is true there need be no privity between the promisor and the party claiming the benefit of the undertaking, neither is it necessary that the latter should be privy to the consideration of the promise, but it does not follow that a mere volunteer can avail himself of it. A legal obligation or duty of the promisee to him will so connect him with the transaction as to be a substitute for any privity with the promisor or the consideration of the promise, the obligation of the promisee furnishing an evidence of the intent of the latter to benefit him, and creating a privity by substitution with the promisor. A mere stranger cannot intervene and claim by action the benefit of a contract between other parties. There must be either a new consideration or some prior right or claim against one of the contracting parties by which he has a legal interest in the performance of the agreement."

The *Pond* case and the case of *Buchanan v. Tilden* (158 N. Y. 109) are good examples of where the rule has been applied, while *Embler v. Hartford S. B. Ins. Co.* (Id. 431, 436) and *Sullivan v. Sullivan* (161 id. 554, 557) are fair illustrations of where the rule is inapplicable.

This case is entirely barren of any evidence tending to prove that there was any obligation resting upon Fraley to the plaintiff at the time when this contract was made between Fraley and the defendant, or at any time since. Fraley was under no obligation to plaintiff to make up any deficiency in the assets or upon this claim which appears to have been owing by the plaintiff, and it is not suggested on behalf of the plaintiff that there was any liability or claim of any kind against Fraley. If the defendant had kept his promise and paid this money to the plaintiff, as he had a right to do, it would not have released, discharged or affected any claim owing by Fraley to the plaintiff, for, so far as the evidence discloses, there was none. It was as to the plaintiff a mere naked promise without

consideration moving from it, and to which it was not even a party. As has already been suggested, the only purpose of this promise by the defendant to Fraley was to protect Fraley and make his stock as valuable as the defendant claimed it to be. Whatever loss or damage has resulted from a breach of this promise the plaintiff may recover against the defendant if it has succeeded to the rights of Fraley under this assignment or otherwise, but I am persuaded that independent thereof and standing upon this promise alone, without a transfer of the claim of Fraley to it, the plaintiff is not entitled to recover.

The plaintiff's exceptions must, therefore, be overruled, and the motion for a new trial denied, and judgment directed upon the nonsuit, with costs.

All concurred.

Plaintiff's exceptions overruled, motion for new trial denied, and judgment directed for the defendant on the nonsuit, with costs.

---

In the Matter of the Judicial Settlement of the Accounts of  
CLINTON A. HASKIN, as Sole Testamentary Trustee of and under  
the Last Will and Testament of PHEBE M. FERRIS, Deceased,  
Appellant.

ELLA QUINLAN, Respondent.

Fourth Department, March 7, 1906.

**Testamentary trustee — when entitled to commissions.**

A testamentary trustee is entitled to commissions when he has executed his trust, although he has for some years paid the income to the beneficiary without deducting his commissions, and has made no accounting during that period. Such failure to deduct his commissions is not a waiver of his right thereto.

APPEAL by Clinton A. Haskin, as sole testamentary trustee of and under the last will and testament of Phebe M. Ferris, deceased, from a decree of the Surrogate's Court of the county of Cayuga, entered in said Surrogate's Court on the 20th day of October, 1905,

App. Div.]

Fourth Department, March, 1906.

so far as the same refused commissions to the trustee upon certain moneys paid to Ellen Quinlan, a beneficiary under the will of which the appellant is trustee.

*Albert H. Clark and Harry T. Dayton*, for the appellant.

*Frank S. Wright*, for the respondent.

KRUSE, J. :

By the will of Phebe M. Ferris her daughter, Ella Quinlan, was left the use of \$2,000 for life. The income was directed to be paid to her semi-annually, and the principal was directed to be paid eventually to the four children of the testatrix's son, James J. Ferris. Clinton A. Haskin was the executor of the will and trustee of the fund. In April, 1905, Haskin was discharged as executor after settling his accounts, and he distributed the moneys in his hands in accordance with the decree, retaining in his hands as trustee, among other funds, the said \$2,000, in accordance with the terms of the will.

The trustee paid regularly to Ella Quinlan the income from May 15, 1895, to May 15, 1904, as the will provided, in all the sum of \$1,140, being paid at the rate of six per cent per annum on the \$2,000. No annual account was filed by the trustee in the Surrogate's Court, and he never made any deductions for his commissions. He testified that he had not done so for the reason that he did not know he had such right, but supposed that would be done when a final settlement was had and he discharged as trustee. The surrogate refused to allow him commissions on the \$1,140 which he had paid to Ella Quinlan, although he still had in his hands the income from May 15, 1904, which was more than enough to pay his commissions on the \$1,140, amounting to \$57, upon the ground that by paying the income to her without deducting and retaining his commissions therefor the trustee had waived payment thereof.

We think, under the circumstances of this case, the trustee should have been allowed his commissions on the \$1,140.

While it is now claimed that the trustee not only waived his right to these commissions, but that the surrogate was justified in withholding them upon the ground of mismanagement, the evidence shows that whatever loss had occurred in the investment of this

fund was voluntarily made good by this trustee, and the surrogate expressly refrained from making a determination that the trustee mismanaged the trust; indeed, there is no claim made by Ella Quinlan, who resisted the payment of the commissions, that she has not been paid the income as the will directed, and the surrogate found that she had been paid regularly and the whole of it on semi-annual rests.

The cases relied upon by counsel for respondent (*Spencer v. Spencer*, 38 App. Div. 403; *Matter of Haight*, 51 id. 310; *Conger v. Conger*, 105 id. 590) we think do not support his contention. It is not sought here to subject the primary fund to the payment of these commissions. No injustice will be done the beneficiary in allowing the trustee the commissions he has fairly earned and, as we think, is justly entitled to receive.

The decree of the Surrogate's Court, so far as it refuses to allow commissions to the trustee on the \$1,140 paid by him to the beneficiary Ella Quinlan, should be reversed and said decree modified so as to allow the same, payable out of any moneys in the hands of said trustee received by him as income from said principal sum of \$2,000, so set apart for the use of said Ella Quinlan for life, with costs of this appeal to the appellant against Ella Quinlan, the respondent.

All concurred.

Decree of Surrogate's Court, in so far as it refuses to allow commissions to the trustee on the \$1,140 paid by him to the beneficiary, Ella Quinlan, reversed, and said decree modified so as to allow the same, payable out of any moneys in the hands of said trustee received by him as income from the principal sum of \$2,000 set apart for the use of said Ella Quinlan, with costs of this appeal to the appellant against Ella Quinlan, the respondent.

App. Div.]

Fourth Department, March, 1906.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. HENRY C. KEIM, and Others, Relators, v. JOHN C. DESMOND and Others, Composing the Board of Assessors of the City of Utica, and JOHN A. CANTWELL, City Clerk of the City of Utica, Respondents.

Fourth Department, March 7, 1906.

**Municipal corporations — certiorari to review assessment for sewer in city of Utica — assessment confirmed.**

The mere fact that a municipal assessment for a sewer is made at a uniform rate according to the frontage of the premises taxed does not of itself show that the assessment is erroneous, as it may correctly represent the proportionate benefit received.

On certiorari to review an assessment so made, the relator does not establish its invalidity by showing that his lands, which were elevated above the other side of the street, had previously been served by a short temporary sewer built on his side of the street only, when the assessors' return shows that the new sewer was designed and built as a permanent structure to serve owners on both sides of the street.

Although the common council has annulled the assessment and sent it back to the assessors for reassessment, who have again made the same assessment, the assessors are the final arbiters as to the extent to which the relator was benefited when the city charter makes their assessment final and conclusive.

McLENNAN, P. J., and NASH, J., dissented, with opinion.

CERTIORARI issued out of the Supreme Court and attested on the 6th day of June, 1905, directed to John C. Desmond and others, composing the board of assessors of the city of Utica, and another, commanding them to certify and return to the office of the clerk of the county of Oneida all and singular their proceedings had in making certain local assessments.

*W. L. Goodier*, for the relators.

*William Townsend*, for the respondents.

KRUSE, J. :

The relators seek to have reviewed by certiorari the validity of a local assessment for constructing a sewer in the street which their lands adjoin. The primary question involved in this controversy is whether, in making their determination, any rule of law was violated by the assessors to the prejudice of the relators. We think this has not been made to appear. The lands of the relators are on the westerly side of the street. They are considerably higher than

on the east side. In 1871 a stub sewer was constructed on the west side of the street about half way across the block, evidently to accommodate temporarily the lands directly opposite the sewer on the west side of the street, which included the relators' premises, the lands on the east side being too low to drain into it. In 1904 the sewer in question was constructed, running substantially parallel with the first but nearer the east side, intended, no doubt, as a permanent part of the general sewer system of the city and to supersede the old sewer. It extended across the entire block and was so built that both sides of the street can drain into it. The assessors in their return state that the "sewer as laid is a benefit to the property owners equally upon both sides of the street, and that said sewer so laid is provided with necessary elbows and tees for connecting with the sewers from houses on each of the lots on the westerly side of South Hamilton Street, and was built and constructed and is adapted for the purpose of draining the lots and houses on both sides of South Hamilton Street." The assessors seem to have apportioned the expenses of this last sewer equally on both sides of the street according to the frontage of each lot. The relators appeared before the assessors and objected to the assessment, but the assessors adhered to their determination, and thereupon the relators filed their objections with the city clerk, as the charter of the city and the act creating the board of assessors permit, to bring the matter before the common council. (Laws of 1862, chap. 18, § 107, as amd. by Laws of 1872, chap. 625; Laws of 1897, chap. 738, § 11, subd. 5, as amd. by Laws of 1901, chap. 384.) That body unanimously annulled the assessment and referred it back to the assessors to make a new assessment, and the assessors again apportioned the expenses as before, making the reassessment precisely the same as the first assessment.

It is not claimed that the officers of the city in constructing this sewer did not proceed as the charter\* provides, or that there is any infirmity in the proceedings, save that the assessment is not made in accordance with the provisions of the charter.

By subdivision 2 of section 99 of the charter (Laws of 1862, chap. 18, as amd. by Laws of 1894, chap. 437) it is provided that, as regards work of this character, the expense thereof shall be assessed

---

\* See Laws of 1862, chap. 18, § 99, as amd. by Laws of 1894, chap. 437.—[REp.]



App. Div.]

Fourth Department, March, 1906.

"upon such real estate as they shall deem benefited thereby, in proportion to the amount of its benefits." The act creating the board of assessors contains a similar provision. (Laws of 1897, chap. 738, § 11, subd. 2.) All local assessments are made by the board of assessors. (Id. § 11, as amd. by Laws of 1901, chap. 384.)

It is contended that in making the assessment the assessors departed from this rule. The objection is now made that the assessment was made upon the foot-frontage basis and not according to what the improvement actually benefited the relators' lands, although the specific objection was not made to either the assessors or the common council that the assessment was wrong because made upon the foot-frontage basis. It was contended there that this sewer was no benefit to the lands on the west side of the street, or as it is put in the objections filed with the city clerk, "That the property on the west side of the street is certainly not benefited to anything like the extent that the property on the east side of the street is by this sewer, and should not pay at same rate as the property on the east side of the street. But, notwithstanding this the assessment is at the same rate on both sides of the street." Assuming, however, that the objections are sufficient to raise the question, we still think that the relators have failed to establish that the assessors departed from the rule laid down in the charter for making assessments of this character. By computation it appears that the assessment is at a uniform rate according to the frontage of the respective premises taxed, but this alone is not sufficient to condemn the assessment, for it may still correctly represent the proportionate benefit of the improvement to each lot (*People ex rel. Scott v. Pitt*, 169 N. Y. 521; *City of Ithaca v. Babcock*, 72 App. Div. 260; *Donovan v. City of Oswego*, 90 id. 397, 401), and this holds good as to premises on either side of the street, for the assessors expressly state in their return that the sewer is laid for the benefit to the property equally on both sides of the street, and for the purpose of this review the return must be taken as true.

While there are other circumstances which might lead to a contrary conclusion, yet it is a question of fact for the assessors involving their judgment and discretion and not reviewable here. (*O'Reilly v. City of Kingston*, 114 N. Y. 439, 448; *Le Roy v. Mayor, etc., of N. Y.*, 20 Johns. 489.)

Although the common council might annul this first assessment and remit the matter to the assessors for reassessment, yet the assessors were the final arbiters of the extent that these lands were benefitted by this sewer. The charter makes the reassessment final and conclusive. (Utica charter, § 107, as amd. by Laws of 1872, chap. 625.) The act creating the board of assessors contains similar provisions. (Laws of 1897, chap. 738, § 11, subd. 5, as amd. by Laws of 1901, chap. 384.)

The cases relied upon by the relators we think do not apply. It appeared in those cases from the physical situation and undisputed facts, that the local improvement was of no benefit to the lands assessed, as in the *Dunkirk* case, where it appeared that the lands were so low that they could not be drained into the sewer. (*Clark v. Village of Dunkirk*, 12 Hun, 188.) Such is not this case. It cannot be said that this sewer is no benefit, and the amount or extent of its benefit to the relators' lands was a question for the assessors. They saw the premises, knew their precise location, area, depth of lots, the extent of the improvements, the relative value of the lots on the west side which are on high ground as compared with those on the low ground on the east side, the condition of the old sewer, the service and added value of the new sewer to these lands and other circumstances, which we cannot know, and regarding which the record is silent.

The objection is also made by the defendants that the writ of certiorari will not lie to review the determination of the assessors for the reason that their determination after the review by the common council is made final and conclusive by the express provisions of the charter and the act creating the board of assessors (*People ex rel. Schuylerville & U. H. R. R. Co. v. Betts*, 55 N. Y. 600; *People ex rel. Rothschild v. Muh*, 101 App. Div. 423), but upon that we express no opinion. We rest our decision upon the ground that the relators have not shown that the assessors violated any rule of law in making their assessment prejudicial to their rights. This they are required to establish to successfully attack its validity.

The writ of certiorari must be dismissed, and the assessment confirmed, with fifty dollars costs and disbursements.

All concurred, except McLENNAN, P. J., and NASH, J., who dissented in an opinion by McLENNAN, P. J.

App. Div.]

Fourth Department, March, 1906.

McLENNAN, P. J. (dissenting):

The sole question presented by this appeal is, was the tax imposed upon the relators on account of the cost incurred in the construction of the sewer in question levied "upon the lands benefited by the local improvement in proportion to such benefit?" If not, the tax was erroneous and its collection should be restrained.

The facts are not in dispute. The relators are owners of real property situate upon the westerly side of South Hamilton street in the city of Utica, N. Y., which street extends along the side of a hill in such manner that the lots of the relators and others similarly situated are considerably higher than the property abutting upon the easterly side of the street. About the year 1871 the city of Utica caused a twelve-inch sewer to be constructed upon the westerly side of said street, in front of relators' property, connected it with its general sewer system, and the relators immediately connected therewith and ever since have continued to use the same, which is in perfect repair and at all times has been adequate and sufficient for their purposes and fully accommodates their property and all other similarly situated and abutting upon the westerly side of said street. The entire cost of the sewer so constructed was assessed upon the property of and paid for by the relators or their grantors, for the reason that the property upon the opposite side of the street, it being so much lower, could not be drained into it. Thereafter and in the year 1904 the city of Utica duly authorized the construction of a sewer upon the easterly side of South Hamilton street, to be laid at such depth as to furnish sewer facilities to those residing upon that side of the street, and also in such manner that it could be used by the relators if they desired to incur the expense of connecting therewith and were willing to abandon the sewer which they had fully paid for and which was in every way as suitable for their purposes as the new sewer, and even more convenient, because connections with it could be made at much less expense.

The new sewer so authorized was constructed in the manner indicated, but the connections of the relators with the old sewer were left intact and their sewage and drainage was in all respects properly cared for as before. To raise the money with which to pay for the new sewer the defendants ascertained the entire cost of the same, the number of feet front of property abutting upon both

sides of the street where the new sewer was laid, divided the entire cost by such number of front feet, found the quotient to be \$0.9670309, and then by multiplying the number of feet front owned by each of the relators by such quotient, determined that the result of such mathematical calculation represented the benefit which each received by the construction of the sewer in question, a sewer which the relators did not require because they already had, and had paid for, another which was perfect in all respects and afforded them ample sewer facilities.

The method adopted by the defendants to ascertain the amount of the tax which should be levied against the relators' property respectively, most conclusively shows that such tax was not levied "in proportion to such benefit," but upon the front-foot principle, and without considering the benefit to any particular owner of property. The statement in the return "that said sewer as laid is a benefit to the property owners equally upon both sides of the street," which is simply a conclusion of law or an expression of an opinion, ought not to be regarded as in any manner establishing the proposition, in view of the conceded facts. Any claim that the tax which is complained of was levied "upon the lands benefited by the local improvement (the new sewer) in proportion to such benefit" it seems to me is absurd in the extreme. As we have seen, the relators had a perfect sewer, which they had paid for, which was suitable and adequate for their use, as good and even more convenient for them than the new sewer. And yet it is said that the construction of such new sewer was of precisely the same benefit to their property as to the property across the street, which had no sewer facilities and which was in urgent need of same.

We will assume that the Legislature has the power to authorize the perpetration of even such a palpable injustice. Practically it has been thus held in the pavement cases, so called, where the front-foot method of assessment has been upheld. We, however, venture to suggest that no such injustice has ever been sanctioned by the courts, except in obedience to legislative mandate. In the case at bar the Legislature, as we think, instead of authorizing, has precluded, the adoption of the front-foot principle in fixing the amount of an assessment like the one in question.

The act creating the board of assessors of the city of Utica (the

App. Div.]

Fourth Department, March, 1906.

defendants) provides (Laws of 1897, chap. 738, § 11, subd. 2) that it shall assess the cost of local improvements, so far as the same is not payable by the city, "upon the lands benefited by the local improvement in proportion to such benefit, except in those cases in which by the charter of said city or by this act the assessment is to be made upon a different principle." Concededly no provision is contained in the act, except as above, providing how an assessment for a sewer improvement shall be made. That such assessment can only be made "in proportion to such benefit" is emphasized by subdivision 2 of section 99 of the charter of the city of Utica (Laws of 1862, chap. 18, as amd. by Laws of 1894, chap. 437), which provides: "In case the work (a local improvement) shall be the constructing in a street of any \* \* \* drain or sewer, separate from any other work," the expense thereof shall be assessed "upon such real estate as they shall deem benefited thereby, in proportion to the amount of its benefits." It is not claimed that the construction of the sewer in question was not entirely "separate from any other work." Subdivision 1 of section 99 of the charter (as amd. by Laws of 1903, chap. 288) provides: "In case the work shall be the grading, leveling or paving, repaving, macadamizing or telfordizing a street, \* \* \* the city surveyor shall ascertain the aggregate front length of lots upon both sides thereof, and the front length of each lot or parcel, \* \* \*. The common council shall then \* \* \* cause the average expense upon each foot of the lots or parcels of land on both sides of said street \* \* \*, excluding cross streets from the computation, to be ascertained, and each lot or parcel of real estate to be assessed with its portion of the expense, by multiplying its number of feet front into the average expense per foot." The same method is prescribed for sidewalks. (Charter, § 99, subd. 3, as amd. by Laws of 1894, chap. 437.)

The provisions of the statutes referred to clearly indicate, as it seems to me, that the defendants in the case of the construction of a sewer, were required to exercise their judgment, and in the other cases, only their mathematical skill.

In the case at bar it is evident, is established beyond controversy, that the defendants failed to exercise the first function, but relied upon their ability to properly solve the mathematical problem which they were directed to solve by the Legislature in case the local

improvement was the construction of a pavement or a sidewalk, instead of a sewer.

There ought not to be given undue significance to the statement in the return of the defendants that said sewer "as laid is a benefit to the property owners equally upon both sides of the street," when, as it appears, such proposition is wholly and entirely refuted by the conceded facts. After all has been said, we come back to the proposition, was the construction of the new sewer, which, we must assume, was required and needed by the property owners abutting upon the east side of South Hamilton street, only worth to them the same price per front foot as such sewer was worth to the property owners abutting upon the westerly side of said street, who already had a sewer of practically the same character, which was adequate and suitable for their purposes, and which was connected with the general sewer system of the city? If not, then the tax complained of was illegal, because, as pointed out, there was in existence no legislative mandate which authorized the same or such injustice. If the contention of the defendants is correct, may they not insist that even a third sewer may be constructed in South Hamilton street for the sole accommodation of the owner of some particular piece of property which is at a much lower grade than any of the rest, and then declare that the cost of such sewer, if constructed so as to accommodate all, should be levied equally upon the owners of property abutting upon each side of said street, according to the number of front feet owned by them respectively? As before suggested, we think the proposition is absurd, has no support in reason or in law, except where the Legislature has seen fit to authorize such iniquity, which it has not done in this case.

We conclude that the assessment or reassessment made by the defendants was made upon a wrong principle and contrary to the uncontradicted facts, and, therefore, should be annulled and declared void as to the relators, with costs.

NASH, J., concurred.

Writ of certiorari dismissed and assessment confirmed, with fifty dollars costs and disbursements.

CATHERINE BANNISTER, Appellant, v. THE MICHIGAN MUTUAL LIFE  
INSURANCE COMPANY, Respondent.

Fourth Department, March 7, 1906.

**Practice — action on life insurance policy — error to dismiss complaint because answer sets out short Statute of Limitations — prior action in County Court discontinued because of lack of jurisdiction — when such discontinuance voluntary under section 405 of the Code of Civil Procedure — when running of Statute of Limitations stopped during such prior action.**

It is error to dismiss the complaint in an action to recover on a policy of life insurance because the answer sets out a one-year Statute of Limitations as to which the complaint is silent, although more than one year has elapsed since the death of the insured. Matters of fact alleged in an answer are not to be regarded as admitted by the complaint for the purpose of a motion to dismiss such complaint. Proof of such allegations must be given.

The plaintiff had begun a prior action on the policy in the County Court and discontinued the same on the defendant's appearing specially to object to the jurisdiction on the ground that it was a foreign corporation. The objection was made five months after the death of the insured, but the plaintiff did not discontinue and bring her new action until more than one year after said death. As to whether or not the discontinuance was voluntary and as to the operation of the short statute under section 405 of the Code of Civil Procedure, *Held* (SPRING and NASH, JJ.), that the purpose of said section is to prevent the running of the Statute of Limitations while an action is pending, and as the defendant had appeared specially and not on the merits, the discontinuance was forced and not voluntary. Hence, the time the action was pending should be deducted from the period, although the second action was not brought within one year from the death of the insured.

(KEUSE, J.): As the record is silent as to the grounds of the discontinuance in the County Court, it is not disclosed that the action was not terminated by voluntary discontinuance.

(WILLIAMS, J., and MCLENNAN, P. J.): As the defendant's objection in the County Court was made five months after the death of the insured, and the plaintiff had allowed a year from the time of death to pass without discontinuing, she could not claim the protection of section 405 of the Code of Civil Procedure.

**APPEAL** by the plaintiff, Catherine Bannister, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Erie on the 18th day of December, 1905, upon the dismissal of the complaint by direction of the court after a trial at the Erie Trial Term.

*William J. Hickey and Le Roy Parker*, for the appellant.

*J. H. Metcalf*, for the respondent.

WILLIAMS, J.:

The judgment should be reversed and a new trial granted, with costs to the appellant to abide the event.

The action is upon a policy insuring the life of one Newkirk, the plaintiff being the beneficiary therein. The complaint was dismissed upon the pleadings, and the only question is whether upon the facts alleged in the complaint, aided by any proper use of the allegations in the answer, it appeared conclusively that the plaintiff could not maintain the action. The defense held sufficient to defeat the plaintiff's recovery was, apparently, the one-year limitation, founded upon the agreement of the parties as expressed in the policy.

The dismissal could not be based upon the complaint alone, because such limitation was a matter of defense. The defendant might raise the question by its answer or, by failing to so raise it, waive the same. It was proper, therefore, for the court to look into the answer to see that the question was properly raised. This was, however, the only proper use that could be made of the answer in determining the motion for dismissal. The matters of fact alleged in the answer were not to be regarded as admitted by the plaintiff, for the purposes of the motion. In order to establish the same, evidence would need to be given. The error in the decision of the court was assuming as true the allegation in the answer that there had been a one-year limitation fixed by the policy. The allegation was that upon the back of the policy was the clause or condition following: "No suit arising out of this contract shall be begun more than one year from the death of the insured." There was no allegation relating to this limitation in the complaint, and the policy was not annexed thereto or made a part thereof. The allegation in the answer did not establish the fact. If the defendant gave any proof to support the allegation, the plaintiff might controvert it, and make the question one for a jury. The court could not assume it to be true, in the absence of proof, and no proof was given.

It appeared that the insured died July 23, 1903, and that this



action was not commenced until October 4, 1904, more than a year after the death. These allegations were found in the complaint. The judgment must, however, be reversed because it did not appear by the complaint that any one-year limitation had been agreed upon by the parties in the policy.

Another question is raised by the plaintiff, which we should consider here, as it may be again presented upon the new trial. The complaint alleged that an action was first brought upon the policy December 3, 1903, in the County Court of Erie county; that on December 23, 1903, the defendant appeared specially in that action and objected to the jurisdiction of the County Court, on the ground that the defendant was a foreign corporation; and that thereafter, and on September 27, 1904, the plaintiff took an order in said County Court discontinuing that action, and soon after commenced the present action, as hereinbefore stated.

Section 405 of the Code of Civil Procedure provides: "If an action is commenced within the time limited therefor, and a judgment therein is reversed on appeal, without awarding a new trial, or the action is terminated in any other manner than by a *voluntary discontinuance*, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits; the plaintiff, or, if he dies, and the cause of action survives, his representative, may commence a new action for the same cause, after the expiration of the time so limited, and within one year after such a reversal or termination."

The plaintiff claims protection under this statute, on the ground that the *discontinuance* of the first action was not *voluntary*; that the County Court had jurisdiction of the subject-matter of the action, and would have had jurisdiction of the person of the defendant but for its objection thereto; that the plaintiff was *compelled to discontinue* the action by the objection interposed by the defendant. The objection to the jurisdiction of the County Court was made only five months after the death. The plaintiff knew then as well as she did nine months later that she could not maintain the action in County Court, but instead of then discontinuing her action and commencing one in Supreme Court, she waited until more than a year after the death, and then discontinued the first action and brought this one. Under these circumstances certainly it could not

be held that the discontinuance was compelled, or was otherwise than voluntary. The plaintiff would not, therefore, be entitled to any protection under the section of the Code referred to.

McLENNAN, P. J., concurred; SPRING and NASH, JJ., concurred in first ground only, in memorandum by SPRING, J.; KRUSE, J., concurred in separate memorandum.

SPRING, J. (concurring):

I concur in the conclusion reached in the prevailing opinion, but dissent from the second ground contained therein.

The plaintiff commenced her action within the time and the County Court had jurisdiction of the subject-matter. The defendant, however, interposed the defense that it was a foreign corporation and this ousted the court of jurisdiction. The plaintiff, appreciating that if she entered upon the trial a dismissal of her complaint was inevitable, elected to discontinue. In the meantime the year's limitation prescribed in the policy had passed. She commenced another action in the Supreme Court and the complaint was dismissed, we may assume, because the action was not commenced within the year and the termination of the preceding action was a "voluntary discontinuance" within the meaning of section 405 of the Code of Civil Procedure.

The purpose of section 405 is to prevent the Statute of Limitations running while an action is pending. If the action is disposed of on the merits, or if the plaintiff of his own motion elects to relinquish his claim, the section does not apply. In this case the plaintiff was forced to discontinue. The defendant could have appeared generally and the case thus been disposed of on the merits. It availed itself of its privilege to appear specially and set up the defense that it was a non-resident, which was true. By virtue of this plea the plaintiff could not secure a trial on the merits. If she had allowed the case to go to trial and a dismissal had followed, unquestionably section 405 would have been applicable and she could have sued over even though the first action had been pending for two years or more.

If her original action had been commenced eleven months and twenty days after the cause of action had accrued and the defendant's answer had been interposed after the year had run, a discon-

tinuance in these circumstances would not have been voluntarily made.

The fact that the plaintiff discontinued the action does not necessarily imply that it was voluntarily done. The defense interposed was complete and a termination of the action either by dismissal at the trial or by the election of the plaintiff without the formality of a useless trial was inevitable. The plaintiff chose to adopt the course which was the least expensive and would be best apt to facilitate the trial on the merits. She did not discontinue with the view of ending the action; she did not discontinue voluntarily in the sense of abandoning her cause. She was driven to stop temporarily because the defendant declined to submit the case to the County Court.

The plaintiff waited several months before discontinuing. The delay does not alter the question. If the discontinuance was not voluntary within the fair meaning of section 405 she could sue over, provided a year had not intervened since the cause of action accrued after deducting the time the first action was pending.

NASH, J., concurred.

KRUSE, J., (concurring):

I concur in reversing this judgment upon the first ground. As regards the other question discussed in the opinion my view is, that the record does not disclose that the action in the County Court was not terminated by a voluntary discontinuance, it not appearing that the plaintiff discontinued the action upon any tenable objection made by the defendant to the jurisdiction of the court. Neither the grounds of the objection nor the manner in which the objection was raised is made to appear. It is not stated that the plaintiff was compelled to discontinue the action because the County Court did not have jurisdiction or even that she discontinued the action upon that ground.

Judgment and order reversed and new trial ordered, with costs to the appellant to abide event, upon questions of law only, the facts having been examined and no error found therein.

THE NIAGARA COUNTY IRRIGATION AND WATER SUPPLY COMPANY,  
Respondent, v. COLLEGE HEIGHTS LAND COMPANY OF NIAGARA  
FALLS and N. LANSING ZABRISKIE, Appellants, Impleaded with  
PHILANDER MOTT, Defendant.

Fourth Department, March 7, 1906.

**Eminent domain — constitutional law — charter of the Niagara County Irrigation and Water Supply Company did not require assent of two-thirds of Legislature — rights of State in waters and bed of Niagara river.**

The charter of the Niagara County Irrigation and Water Supply Company (Laws of 1891, chap. 259, §§ 4, 6), authorizing said corporation to take water from the Niagara river and to construct, operate and maintain canals, provided pipes or tunnels under the waters of the Niagara river are so laid and constructed as not to interfere with the navigation of said river, does not appropriate any property of the State to the use of the corporation either in the waters or bed of the stream. Hence, said act did not violate the provisions of section 9 of article 1 of the State Constitution of 1846, then in force, in not receiving the assent of two-thirds of the members elected to each branch of the Legislature.

The State has no ownership of the waters of the Niagara river, and, while in a certain sense it is the owner of the bed of said river, it holds not as a proprietor but as sovereign in trust for the people. Said charter does not confer upon the corporation the right to take or make use of the property of other persons or of the State until it has acquired such property in a legal way.

APPEAL by the defendants, College Heights Land Company of Niagara Falls and another, from an order of the Supreme Court, made at the Erie Special Term and entered in the office of the clerk of the county of Niagara on the 24th day of October, 1904.

*De Witt V. D. Reiley* and *James H. Hanson*, for the appellants.

*J. Boardman Scovell*, for the respondent.

WILLIAMS, J. :

The order should be affirmed, with costs.

The order was made on presentation of a petition by plaintiff asking to condemn certain real property of the defendants for the construction and maintenance of its works. The defendants filed

objections and moved to dismiss the petition. The court, by the order, overruled the objections, denied the motion to dismiss, directed the service of the answers to the petition, and ordered the issues raised by the petition and answers to be tried at the equity term of the court.

While four objections were made to the petition, it seems that only the *fourth* one is to be considered on this appeal, the other *three* having been waived by stipulation of the parties. Both parties so state in their points. The stipulation is not printed in the record, however. The fourth objection is:

"4. That said Act (incorporating plaintiff) is unconstitutional and void, in that said Act did not receive the assent of two-thirds of the members elected to each branch of the Legislature which passed the same."

The respondent concedes in its points that the act in question did not receive the assent of two-thirds of such members. The provision of the Constitution alleged to have been violated was section 9 of article 1 of the Constitution of 1846, which is the same as section 20 of article 3 of the present Constitution of 1894, and is as follows:

"§ 9. The assent of two-thirds of the members elected to each branch of the Legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes."

The act in question is chapter 259 of the Laws of 1891. The purposes of the corporation as stated in section 3 "are the construction and maintenance of a public waterway from a point in the Niagara river between the west bank of Cayuga creek and the east line of lot seventy-one of the Mile Reserve, so called, as may be most convenient, which waterway may be constructed as a canal, ditch or tunnel as shall be necessary and convenient for the proper operation thereof and the uses for which it is constructed. The supplying from said waterway and conduits, ditches, canals, tunnels and pipes leading therefrom of pure and wholesome water to the village of Lewiston and the inhabitants thereof, and to any other city or village now or hereafter located in the towns of Niagara, Lewiston or Porter in the county of Niagara, and the inhabitants thereof. The storage, accumulation, conduct, supply, lease and sale of water for fire, sanitary, municipal, mechanical, mer-

cantile, manufacturing, domestic, commercial or agricultural purposes, including the purpose of irrigation."

Section 4 provides that "Said corporation may, for the purposes of its corporation, take water from the Niagara river between the points hereinbefore specified, and may discharge such water into the Niagara river at such points within or adjacent to the towns of Lewiston or Porter as it may select. \* \* \* It may build, erect, construct, dig and lay any canals, raceways, ditches, locks, piers, inlet piers, cribs, bulkheads, dams, gates, sluices, reservoirs, aqueducts, tunnels, conduits, pipes, culverts or other works, machinery or buildings of every kind and description, whatsoever, that may be necessary and convenient for any of its purposes."

And the latter part of section 6 provides that the corporation "may construct, operate and maintain its said canals and other works for the purposes of said corporation as hereinbefore specified, provided that in case of pipes or tunnels under the waters of the Niagara river they are so laid and constructed as not to interfere with the navigation of said river."

There is no doubt that the purposes of the corporation are local and private. So that the question is narrowed down to the inquiry whether by sections 4 and 6 of the act there was an appropriation of public property for the purposes of the corporation.

1. The State has no property or ownership in the waters of the Niagara river within the provision of the Constitution in question, although it has dominion over the same and power to regulate the use and diversion thereof and encroachments thereon as navigable waters of the State. (*Sweet v. City of Syracuse*, 129 N. Y. 317, 334; *Waller v. State*, 144 id. 579, 599.)

So far, therefore, as the act may be said to appropriate the water of the river it does not violate the provision of the Constitution in question.

2. The only question remaining is whether the act permitted the construction of conduits, etc., necessary to take the water from the river so as to appropriate any property in the bed of the river in violation of such constitutional provision. The State was in a certain sense the owner of the bed of the river. It held the title, not as a proprietor, but as sovereign, in trust for the public. (*Saunders v. N. Y. C. & H. R. R. Co.*, 144 N. Y. 75, 85.)

App. Div.]

Fourth Department, March, 1906.

There is a view taken of such acts as the one in question, which seems reasonable, that the Legislature does not transfer any title to the bed of the river to the corporation, and does not even license the use thereof, but merely confers the power upon the corporation to do what is necessary to carry out its purposes. It does not confer any right upon the corporation to take or make use of the property of other persons or of the State until it has acquired such property in a legal way. (*Matter of New York & L. I. Bridge Co.*, 90 Hun, 312, 326; S. C. on appeal, 148 N. Y. 540, 555.) In this view the act is not to be regarded as appropriating any property of the State to the use of the corporation, either in the water or the bed of the stream, in violation of the provision of the Constitution in question. It has designated the general powers of the corporation, and if any property rights are required from the State involving the appropriation of property they must still be acquired in a manner provided by law under the Constitution. We do not think a necessary construction of the act requires us to hold it violates the constitutional provision in question.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

---

In the Matter of the Judicial Settlement of the Accounts of FREDERICK H. STEVENS and ELLA BROOKS SOLANO, as Surviving Trustees, etc., of JULIA A. BROOKS, Deceased, Respondents.

JESSE BROOKS NICHOLS and Others, Appellants; JESSIE BROOKS TYLER, Appellant, Respondent.

Fourth Department, March 7, 1906.

**Trust — beneficiary entitled to "dividends, issues and profits" of stock in manufacturing corporation — what portion of increase in assets of corporation included under said terms.**

A will, creating certain trusts in specific stock of a corporation manufacturing locomotives, directed the trustees to pay to the use of the beneficiaries "the dividends, issues and profits thereof" until the beneficiaries arrived at the age of thirty years, when the stock itself, with any accumulations or earnings

thereon, was to be paid to the beneficiaries absolutely, or, if dead, to the issue, etc.

The corporation made large earnings and increased its assets, and finally sold its entire plant, equipment and materials and was dissolved. In determining what portion of the total assets of the corporation should be paid to the beneficiaries as "dividends, issues and profits," and what portion was to be treated as principal,

*Held*, that at the death of the testatrix the value of the plant, equipment and materials, good will, patents and patent rights, licenses, trade marks, privileges and franchises and necessary working capital were to be treated as principal, and that the balance of the assets, consisting of invested surplus and working cash capital, should be taken as "dividends, issues and profits;"

That a large increase in the value of the assets at the time of sale, made up of materials and "betterments," was to be treated as principal, being an increase in the value of the property itself, and should not be treated as a "profit" arising from or growing out of the stock held in trust;

That the words "dividends, issues and profits," used in the creation of the trust, must be construed as meaning "income or earnings," and that a large balance representing good will could not be taken as earnings or increase;

That the value of the material on hand and the "betterments" at the time of sale should be considered as part of the capital or principal rather than "income or earnings," so far as the trusts were concerned;

That the question as to whether a sinking fund should have been provided to make up the loss in value of bonds held by the corporation, owing to a fall in premium value thereof, was to be determined by the intention of the testatrix, to be gathered from the terms of the will and from the surrounding circumstances; and that in the case at issue no such sinking fund was required.

SEPARATE APPEALS by Jesse Brooks Nichols and others, beneficiaries under the will of Julia A. Brooks, deceased, from portions of a decree of the Surrogate's Court of Chautauqua county, entered in said Surrogate's Court on the 15th day of April, 1905, settling the account of the trustees under said will.

*Clare A. Pickard* and *Fred Greiner*, for the appellants.

*John Ewen*, for the appellant, respondent.

*George A. Lewis*, for the respondents.

WILLIAMS, J. :

The decree should be affirmed, with costs to the trustees, the special guardian and Jessie Brooks Tyler, payable out of the fund.



App. Div.]

Fourth Department, March, 1906.

The testatrix made the will October 5, 1896, and died November 5, 1896. The will was admitted to probate November 16, 1896, and Stevens and Solano qualified as executors and trustees thereunder and served as such. The former was a son-in-law and the latter a daughter of the testatrix. By the will, articles 8, 9, 10, 11 and 12, five trusts were created, each of 247 shares of the stock of the Brooks Locomotive Works, for the benefit of five grandchildren. The language of the five articles was precisely the same except as to the name of the beneficiary. The stock was given to the executors in trust, to hold the same, collect the *dividends, issues* and *profits* thereof, and apply to the use of the beneficiary, in semi-annual payments or as often as the same shall be *declared, paid* or *realized*, until the beneficiary arrived at the age of thirty years, and then the stock with any accumulations or earnings thereon to be transferred to the beneficiary absolutely. If the beneficiary died before he became thirty years old, leaving issue surviving, the same to go to such issue; if there were no such issue, the same to go to the then surviving children and grandchildren of testatrix, they taking *per capita* and not *per stirpes*.

These articles were subject to article 13 of the will, which provided that the executors should not be held liable for any depreciation in the value of the stock, and while the testatrix wished the stock to be held so long as it seemed to the executors prudent to hold it, yet she authorized them to sell it and reinvest the proceeds whenever they deemed it prudent to do so, and they should not be held liable for any loss or depreciation in such investments resulting from mistakes in judgment in making the same.

The Brooks Locomotive Works was organized by the husband of the testatrix in 1869. The capital stock was \$250,000, in shares of \$100 each, and has always remained the same. Mr. Brooks was, during his lifetime, the president and dominating spirit of the company. He died in 1887. At the time of his death the company was a prosperous business concern. A majority of the stock went to the testatrix when her husband died, and she assumed the control of the affairs of the company, which continued in a prosperous condition until her death, in 1896. The period of the company's greatest prosperity was, however, between 1896, when the will was made and the testatrix died, and in 1901, when the company sold

Fourth Department, March, 1906.

[Vol. 111.]

out and discontinued business. At the death of the testatrix the value of the total assets of the company was..... \$1,791,708 59

The value of plant and equipment being... .. \$748,152 43

And value of materials being..... 345,193 35

Cash, bills receivable, etc.:

Invested surplus... .. \$418,492 50

Working cash capital..... 279,870 31

698,362 81

These figures make no account of the value of the good will, franchise rights or dividend earning capacity of the company as a going business concern. This was the property as it existed when the will was made and took effect at testatrix's death.

One of the questions involved in the case was how much of this amount constituted principal and how much "dividends, issues and profits" under the provisions of the will creating the trusts in question. What were the rights in the fund between the holders of the intermediate estates and the remaindermen? The surrogate held that the principal was the value of the plant, equipment and materials, and its good will, patents, patent rights, licenses, trade marks, rights, privileges and franchises, called above plant, equipment and materials..... \$1,093,345 78

And necessary working capital..... 70,000 00

Making a total of..... \$1,163,345 78

And the balance, being invested surplus ..... \$418,492 50

And working cash capital..... \$279,870 31

Less above..... 70,000 00

209,870 31

Making a total of..... \$628,362 81

was "dividends, issues and profits," and this result is not seriously objected to here. It was, at all events, substantially correct.

From 1896 to 1901 the business increased largely. Three hundred and five per cent in dividends were paid to the stockholders, and profits were made besides those dividends amounting to \$1,424,034.82, which were undivided at the time of the sale hereinafter referred to, and a part of which had been invested in betterments and materials.

App. Div.] Fourth Department, March, 1906.

June 20, 1901, the company sold its entire plant, equipment and materials for..... \$6,626,837 00

Of which, materials, supplies, product, finished or in process, patterns, drawings and templates, were valued..... \$1,126,837 00  
Value of plant and equipment at death of testatrix. 748,152 43  
Expended for betterments since her death..... 553,410 57  
And the balance was.... 4,198,437 00

which covered all patents, patent rights, licenses, trade marks, rights, good will, privileges and franchises, and an agreement that the company should be wound up and dissolved and all capital stock turned over to the purchaser, and that the company and its officers should not for ten years thereafter carry on the business of manufacturing locomotive engines. There was expressly excepted from the sale cash on hand or in bank, bills and accounts receivable, stocks, bonds, leases, agreements, warrants or other forms of invested surplus earnings. The sale was fully consummated, the company received the purchase price, and was itself finally dissolved October 30, 1903. After the sale there was paid and distributed to the stockholders, including the trustees under the will, as accumulated surplus earnings..... \$900,000 00

Being those as found at testatrix's death..... \$628,362 81  
And those accumulated thereafter.... 271,637 19

There seems to be no controversy but that these payments were properly made and, so far as the trusts in question were concerned, were properly distributed to the holders of the intermediate estates. The main contention arises over the increase of the assets, or the value thereof, at the time of the sale in 1901.

The principal at testatrix's death was ..... \$1,163,345 78  
The sale was for..... 6,626,837 00

The increase was..... \$5,463,491 22

This was made up of materials..... \$781,643 65  
Betterments..... 553,410 57  
And balance of..... 4,128,437 00

The question is whether this increase is to be regarded as principal or as "dividends, issues and profits." The surrogate decided it was to be regarded as principal and "accretions" thereto. It will be noted that there is no controversy *now* as to what the principal was at the time the trusts were created. Between that time and the discontinuing of business, however, the income of the company had increased, large dividends had been paid from time to time, which went to the holders of the intermediate estates so far as the trust shares were concerned. Other earnings of the company were used to purchase additional materials and to make additional betterments. And there was, moreover, a large general increase in the value of the property itself, including among other things the good will of the business, which had not been considered in making up the "principal" as of the date of the creation of the trusts in question, and including also patents, patent rights, privileges and franchises, the agreement to go out of business and dissolve the company and not itself or its officers to carry on the same business for ten years thereafter.

The words "dividends, issues and profits," used in the creation of the trusts, should be construed as meaning practically "income or earnings." The large balance of \$4,128,437, covering good will, franchises, etc., can hardly be regarded as earnings or income. It was an increase in the value of the property itself, and such increase was in no proper sense a profit arising from or growing out of the stock which was the subject of the trusts. This principle was clearly enunciated and illustrated in *Stewart v. Phelps* (71 App. Div. 91; *affd.* on opinion below, 173 N. Y. 621).

The terms of that trust were "rents, income, issues and profits," and they were held to give the intermediate beneficiary only the annual income, and not any increase in the value of the securities in which the fund was invested.

There is some reason to question the correctness of the surrogate's conclusion as to the other two items of materials and betterments. Those were the product of the surplus of yearly "income or earnings." The betterments had become a part of the property itself, the plant and equipment. The materials were on hand and were simply materials, or in process of manufacture into locomotives. These amounts were to be distributed to the stock-

App. Div.]

Fourth Department, March, 1906.

holders, not of a going concern, but of a company that had ceased doing business and had been closed up. Were they a part of the "principal" of the trust fund, or were they "income or earnings?"

In *Matter of Rogers* (22 App. Div. 428; 161 N. Y. 108) there were some conditions very like those here involved. The company started in 1838 with a capital of \$300,000. Rogers died in 1868. The words used in creating the trust were "*income or interest.*" During the continuance of the trust the company paid ten per cent dividends semi-annually. The business was very successful, large improvements were made in the plant, and large investments were made *outside* in bonds, stock and real estate. In 1893 the whole plant, materials and good will were sold for \$2,750,000 in the stock of a new company organized for the purpose of acquiring the property, and the old company went out of business. The old company had other property besides that sold of the value of \$3,000,000, and both these amounts, in all \$5,750,000, were divided between the stockholders. The large increase in the property of the company resulted from accumulated and undivided profits and earnings of the company since its organization in 1838. The \$3,000,000, at the time of the closing up of the business, was not being used in any way as active capital. It was invested in *securities outside*. In making a division of the fund, so far as the trusts were concerned, the \$2,750,000 stock in the new company, issued to the stockholders in the old company, was regarded by the surrogate as capital, while the \$3,000,000 of outside investments was regarded as profits or accumulated income. The Appellate Division and the Court of Appeals affirmed the surrogate. Clearly, the moneys invested *outside* the business could not be regarded as capital. The amount received on the sale, however, was all held to be capital, including that for material, whether in process of manufacture or not, and the courts held this to be, in the absence of proof to the contrary, a part of the working capital, necessary to use in the business, and, therefore, capital, and not merely "income or interest." It was the product of accumulated, undivided profits, that had been made a part of the property itself, as necessary to the carrying on of the business, enlarged and extended as it had been. This decision is authority for holding the betterments and materials

in this case a part of the capital or principal, rather than "income or earnings," so far as these trusts are concerned.

We have carefully examined the surrogate's opinion (46 Misc. Rep. 623) and the briefs of counsel, and the various cases referred to by them, and must refrain from making any argument ourselves, or attempting to harmonize the apparent conflict in the decisions of the Court of Appeals. We conclude upon the authority of the *Rogers Case* (*supra*), and upon a reasonable construction of the terms of these trusts, that the surrogate was correct in his decision in reference to this part of his decree. If we are wrong, the Court of Appeals can readily correct us.

The question as to a sinking fund, so called, arises out of the consideration that there has been a decrease in the value of some bonds, in which investments have been made, by the wearing away of premiums thereon, to the amount of \$9,158, and it is claimed this amount should have been provided for by reserving interest received thereon to meet this deficiency. This question has been held to be largely one of the intention of the testatrix, to be determined in each case upon the language of the will and the surrounding facts and circumstances. (*McLouth v. Hunt*, 154 N. Y. 179; *Matter of Hoyt*, 160 id. 607; *New York Life Ins. & Trust Co. v. Baker*, 165 id. 484.)

The surrogate considered the question under this rule, and concluded that no sinking fund was required as to these bonds in question. We have examined and considered his opinion and the briefs of counsel, and the cases referred to therein, and see no reason to disagree with the surrogate's conclusion. There has been a very large increase in the estate by reason of the holding of the common stock of the new locomotive company, \$2,750,000, and some preferred stock of the company, 13,000 shares, in which investments have been made. Perhaps this consideration has no real bearing upon the question of a sinking fund as to other securities, but it hardly seems in accordance with equity and equality to permit the remaindermen to retain the large increase realized upon some securities and at the same time require the holders of the intermediate estates to contribute from their income amounts to keep the other securities good for their original purchase price, and the courts will lean towards an equitable and just disposition of these questions.

App. Div.]

Third Department, March, 1906.

The decree should be affirmed, with costs, as hereinbefore suggested, payable from the fund.

All concurred.

Decree of Surrogate's Court affirmed, with separate bills of costs to the trustees, special guardian and Jessie Brooks Tyler payable out of the fund.

In the Matter of the Application of JESSE M. WOOD and Others, Respondents, to Alter a Highway in the Town of Gilboa, by Laying Out a New Part and Discontinuing a Part of the Old Highway and the Assessment of Damages Therefor.

JESSE M. CORNELL and TOWN OF GILBOA, Appellants.

Third Department, March 7, 1906.

**Highway Law—highway commissioners may waive notice of application to lay out road—when public officers may waive statutory provisions.**

In a proceeding to lay out a new highway, highway commissioners, though entitled by section 83 of the Highway Law to five days' notice of the application, waive the failure to serve said notice by appearing before the County Court without making objection. Said provision for notice is one that may be waived by the person entitled thereto although he be a public officer.

Waiver of statutory provisions by public officers considered and the rule stated.

**REARGUMENT** of an appeal by Jesse M. Cornell and another from an order of the County Court of Schoharie county, entered in the office of the clerk of the county of Schoharie on the 14th day of February, 1905, denying the appellants' motion to vacate and set aside an order granted on the 16th day of May, 1904, appointing three commissioners to determine the necessity of proposed highway alterations in the above-entitled proceeding, and also to vacate and set aside an order granted on the 3d day of September, 1904, confirming the decision of the said commissioners.

The opinion of Mr. Justice SMITH on the former argument of this appeal is reported in 107 Appellate Division, 514, reference to which report is made for a detailed statement of the facts herein.

*Eugene E. Howe*, for the appellants.

*M. S. Wilcox*, for the respondents.

COCHRANE, J.:

The commissioners to determine upon the necessity of the proposed highway alterations were appointed at a term of the Schoharie County Court, held in the village of Schoharie on the 16th day of May, 1904. Section 83 of the Highway Law provides that five days' notice of the time and place of the application to the County Court for the appointment of such commissioners shall be given to the highway commissioner of the town. Such notice was not given, but the highway commissioner being apprised of the proposed application appeared by counsel in the County Court without objection, and such appearance is recited in the said order granted on said 16th day of May, 1904.

It was held on the former argument that said order of May sixteenth was a valid order, made by a court of competent jurisdiction and that the notice of five days to the highway commissioner was waived by him by virtue of his appearance without objection.

The proposition that the highway commissioner waived the statutory notice of five days was stated by the court without discussion. Neither did the proposition receive any consideration by counsel on the former argument. The appellants now challenge the correctness of this proposition, and assert that the highway commissioner being a public officer could not waive the notice of five days required by the statute to be given. This point is vital to this appeal, and as it was not discussed by court or counsel on the former argument a reargument of the appeal has been granted.

The appellants in support of their contention urge three cases which will now be considered. The first is *People ex rel. Commissioner of Highways v. Connor* (46 Barb. 333). In that case referees appointed to determine an appeal from the determination of the highway commissioner had failed to take the statutory oath. The statute in that case in effect declared that until the referees were sworn they were incompetent. Without the oath they had no jurisdiction to proceed in the discharge of their duties. Further-



App. Div.]

Third Department, March, 1906.

more, such oath would have bound the consciences of the referees; might have affected the result of their deliberations, and, hence, vitally and personally concerned every taxpayer in the town.

The next case is *People ex rel. Stephens v. See* (29 Hun, 216). In that case a notice demanding that a jury be drawn had been given to the town clerk three days before the return thereof and to the highway commissioner one day before such return under a statute which was held to require ten days' notice to the town clerk and seven days' notice to the highway commissioner. Such notice was of course held to be insufficient. The court said: "The question presented by the return to a writ of certiorari issued herein, is what notice of dissatisfaction is required to be served upon a town clerk in cases where a reassessment is asked by a jury under chapter 455 of the Laws of 1847." Manifestly the highway commissioner could not waive notice which was required to be served on a town clerk. The court did not hold in that case that the highway commissioner could not waive notice intended only for himself.

The third case referred to is *People ex rel. American Contracting & Dredging Co. v. Wemple* (60 Hun, 225). That was a proceeding to review an assessment of taxes made by the State Comptroller. What the court said in that case bearing on the question of waiver concerned two preliminary objections raised under a statutory provision requiring the proceeding in question to be brought within thirty days from a specified time, whereas it was claimed that the proceeding had not been brought within such time, and also requiring that the papers upon which motion for the writ was made including notice of motion should be served on the Comptroller at least eight days before such motion. The case was not decided on the questions thus raised, but they were discussed by the court. It is very clear that the Comptroller in that case could not waive any proceeding the effect of which would be to permit or create a remedy which might adversely affect the people of the State. If the proceeding was not brought within the statutory time it was barred and no act of the Comptroller could revive the same. Nothing was decided in that case which sustains the claim of the appellants herein.

What has been said in reference to the cases above cited illustrates the principle underlying the proposition that public officers

cannot in all cases waive statutory provisions and also marks the distinction between those cases and the present. A person cannot waive a right which belongs to some other person. A public officer cannot waive that which may benefit or affect the public. He cannot, therefore, as held in the cases above cited, waive an oath of a referee when such oath affects the determination of the referee as to a matter of public concern; he cannot waive a notice required to be given to another officer; he cannot waive a statutory provision when the effect of such waiver would be to revive an action or proceeding affecting adversely the State or a subdivision thereof when the right to such action or proceeding would, except for such waiver, be lost by lapse of time.

Let us now consider the nature and purpose of the notice required to be given to the highway commissioner under section 83 of the Highway Law. Prior to the amendment of that section by chapter 334 of the Laws of 1894, no notice to the highway commissioner was required. The purpose of the amendment of course was to enable the commissioner to appear on the application and oppose or favor the same as he might deem proper. The notice when served on him is not required to be deposited or filed by him in any public office. He is not required to publish or disclose its contents to any other person. It is intended for him alone. When it reaches him its mission has been fulfilled; its potentiality has been exhausted; its vitality has expired. It does not touch the integrity of the subsequent proceedings or the result thereof as did the referee's oath in the case above mentioned. It does not reach beyond the commissioner and thus enable or require some other person to take some step pertaining to the proceeding as did the notice required to be served on the town clerk in the case above mentioned. It can influence the conduct of no one save the highway commissioner himself. The public, it is true, has a right to have the highway commissioner perform his duty, but if that duty is performed it is a matter of no consequence to the public or to any person save the commissioner himself whether he has performed such duty after a notice of five days or less. The commissioner appeared on this application and presumably discharged his duties in connection therewith. He did not waive notice of the application as his appearance on the application demonstrates. All that he waived

App. Div.]

Third Department, March, 1906.

was the length of notice. This was a mere detail of practice personal to himself and of no materiality save to himself alone.

The correct rule is declared in *People ex rel. Commissioner of Highways v. Connor (supra)*, as follows: "The whole town had an interest in the proposed highway and had a right to require that the proceedings should in all material respects conform to the requirements of the statute." So, also, in *Merritt v. Village of Portchester* (71 N. Y. 312), it is said: "The statute must be strictly pursued, and any departure in substance from the formula prescribed by law vitiates the proceedings." This rule, although strict, has not in the present case been disregarded. The highway commissioner had notice and appeared on the application. The failure to give him as long notice as he might have claimed under the statute was not such a "material" deviation from the requirements of the statute or such a "departure in substance from the formula prescribed by law" as to vitiate the proceeding.

The order should be affirmed, with ten dollars costs and disbursements.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

---

CHARLES COOPER, Appellant, v. HENRY B. PAYNE, Respondent.

Third Department, March 7, 1906.

**Conditional sale — when goods are retaken by vendor the consideration of notes given for purchase price fails — vendor not entitled to apply proceeds of sale of goods on notes — retaking of property inconsistent with affirmance of sale.**

When, after a sale and delivery of goods and a failure of the vendee to pay therefor within the time set, the parties have entered into a written agreement that the sale shall be conditional with the right in the vendor to retake possession on the failure of the vendee to pay notes given for a balance due, and the vendor has asserted his title and retaken possession, he cannot thereafter recover the purchase price, and the consideration for the notes fails.

APP. DIV.—VOL. CXI. 50

Neither can the vendor sell the goods reclaimed and apply the proceeds on said notes as the whole original indebtedness is wiped out.

Nor can the vendor maintain in an action on such notes that his negotiation of the notes and retaking of property showed an election to affirm the sale. If so, the retaking of the property was conversion and he cannot assert his own wrong as a reason why he should recover on the notes.

APPEAL by the plaintiff, Charles Cooper, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Montgomery on the 25th day of April, 1905, upon the decision of the court rendered after a trial at the Montgomery Trial Term, the jury having been discharged, dismissing the complaint.

*Andrew J. Nellis* and *J. S. Sitterly*, for the appellant.

*Henry V. Borst*, for the respondent.

COCHRANE, J. :

This action is on a promissory note given by the defendant to the plaintiff in part payment of a machine manufactured by the plaintiff for use in the defendant's factory. The machine was ordered by the defendant in December, 1902. Plaintiff accepted the order, agreeing to deliver the machine within sixty days, and that the stipulated price therefor should be paid within thirty days after delivery.

The machine was sent to the defendant, and payment therefor not having been made within thirty days after it reached him the parties thereafter and on May 26, 1903, executed a contract in which it was recited that the defendant had on the last-mentioned day purchased the machine conditionally of the plaintiff, and that said machine was then in defendant's possession, and that defendant would pay therefor a specified sum on demand, and by such contract it was expressly agreed "that the title of the said property does not pass by virtue of this conditional sale, but said property is to remain the property of the said Charles Cooper, his heirs and assigns, and subject to his control until above-described payment is made," and it was also agreed that in case of failure by the defendant to make payment for the machine such failure should work a forfeiture of all his legal and equitable claim to the property, and that the plaintiff should have the right to take possession thereof.

App. Div.]

Third Department, March, 1906.

On December 1, 1903, no part of the purchase price of the said machine having been paid, the parties executed another written instrument providing for a series of four promissory notes to be given by the defendant to the plaintiff in payment of the machine, which instrument also provided that it should not in any way affect any of the terms, covenants and conditions of the former written instrument of May 26, 1903.

At the time of executing the instrument of December 1, 1903, there was due to the plaintiff from the defendant a small amount for merchandise. This, however, was included in a cash payment of \$100 made by the defendant at that time, and the balance of said payment of \$100 was to apply on the purchase price of the machine. So that there was no consideration for the four promissory notes except the purchase price of the machine and interest.

The said four promissory notes matured at different times. Action was brought on the one first maturing, in which action plaintiff recovered a judgment which was affirmed on appeal to this court. (*Cooper v. Payne*, 103 App. Div. 118.) The note herein involved is the second one of the series. After the commencement of this action, and on June 28, 1904, plaintiff took the machine against the protest of the defendant, and on July 8, 1904, sold it after advertising the same and on notice to the defendant, and claims to have applied the proceeds after deducting the expenses of the sale on the two notes of the series last maturing. Defendant, by supplemental answer which he was permitted by the court to serve, alleges as a defense to this action the taking of such property by the plaintiff, and the consequent failure of the consideration of the promissory note on which the action is brought.

It was held by this court in the former action (103 App. Div. 118), in affirming the judgment in plaintiff's favor on the first promissory note, that the contract of May 26, 1903, constituted a transaction of conditional sale, and that the plaintiff became a conditional vendor and the defendant a conditional vendee; that there was between the parties only an executory contract of sale, not to be completed until payment was fully made. It was by reason of such determination that the plaintiff procured in that action an affirmance of the judgment in his favor, the defense being a breach of an implied warranty in the sale of the machine, and the court

holding that the defendant not having returned or offered to return the machine after discovering its defects, such warranty did not survive the acceptance of the property, the contract of sale being executory only, although the rule would have been different if the sale had been executed. The facts in the two actions concerning the nature of this contract are the same and the determination in the former action that the transaction was one of conditional sale forecloses further discussion of that question.

The relation between the parties being that of conditional vendor and conditional vendee plaintiff cannot after asserting his title to the property in question and taking the same from the defendant's possession and selling the same recover the purchase price thereof. (*Earle v. Robinson*, 91 Hun, 363; *affd.*, 157 N. Y. 683, on opinion below; *White v. Gray's Sons*, 96 App. Div. 154.) Plaintiff cannot disaffirm the contract of sale, take and keep his property and at the same time require the defendant to pay therefor. Neither could he sell the property and apply the proceeds of such sale on the promissory notes of the defendant. That was attempted in *Earle v. Robinson* (*supra*), but it was held that there was a failure of consideration and that the whole original indebtedness was wiped out by the action of the creditor.

Plaintiff negotiated the promissory note which is the subject of this action, and now claims that such act on his part, and the institution by him of actions on this and the former note, and his subsequent acts in reference to the sale of the property, constituted an irrevocable election on his part to affirm the sale and made it impossible for him to take the property as owner. Such acts on the part of the plaintiff might be available to the defendant in an action involving title to the property. (*Orcutt v. Rickenbrodt*, 42 App. Div. 238.) But the plaintiff cannot avail himself of his own acts or omissions performed long after the execution of the contract in question to impart a character to such contract which it did not otherwise possess. The status of the parties was fixed when the contract was made and plaintiff could not change it by his own subsequent acts or omissions. Moreover, this contention of the plaintiff reacts against himself. For the only justification he had for taking this property was this contract which has been held to be a conditional contract and which gave him the right only to take the

App. Div.]

Second Department, March, 1906.

property as owner, and if he had irrevocably affirmed the sale to defendant, as he claims, so that he could not take the property under such contract, as owner, then he had no other right whatever to take it and his action in taking it was a conversion thereof. But he cannot urge his own wrongful act in converting the property as a reason why he should maintain this action.

The judgment should be affirmed, with costs.

Judgment unanimously affirmed, with costs.

---

THE TOWN OF NORTH HEMPSTEAD, Appellant, v. LOUISE U.  
ELDRIDGE, Respondent.

Second Department, March 2, 1906.

**Municipal corporations — town of North Hempstead not owner of lands  
under water south of Saddle Rock in Little Neck bay.**

The lands under water south of Saddle Rock in the east part of Little Neck bay, in the town of North Hempstead, were not granted to said town by the Dutch patent of November 16, 1664, made by Governor Kieft, or by the patent of March 6, 1666, by Governor Nichols, or by the patent of April 17, 1685, but, on the contrary, the title to such lands remained in the sovereign and is now owned by the State or its grantees.

Hence, said town of North Hempstead cannot recover said lands in an action of ejectment brought against the owner of adjoining uplands, who is in the possession of said lands under water.

History of early grants to town of North Hempstead.

APPEAL by the plaintiff, The Town of North Hempstead, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Nassau on the 22d day of December, 1904, upon the report of a referee dismissing the complaint.

*Henry Warren Beebe*, for the appellant.

*Charles H. Young* [*George W. Davison* with him on the brief], for the respondent.

Judgment affirmed, with costs, upon the opinion of STEPHEN H. OLIN, Esq., referee.

HIRSCHBERG, P. J., WOODWARD, JENKS and RICH, JJ., concurred.

The following is the opinion of the referee :

OLIN, Referee :

This is an action of ejectment. The plaintiff seeks to recover about nine and eighty-one one-hundredths acres of land under water now in possession of the defendant, who is owner of the adjoining upland. This land is situated south of Saddle Rock in the east part of Little Neck bay (formerly Matthew Garretson's bay) in the town of North Hempstead, county of Nassau. Little Neck bay is on the north shore of Long Island opening from Long Island Sound, and is divided at its head by a small peninsula now called Little Neck.

The plaintiff bases its claim upon patents from the Dutch Governor, Kieft, and the English Governors, Nicolls and Dongan.

Until 1784 the town of Hempstead ran from north to south across the island. By chapter 21 of the Laws of 1784 the town of North Hempstead was set off by an east and west line and became vested with the right and title of the old town of Hempstead to the lands within its boundaries, including those adjacent to the sound. (*North Hempstead v. Hempstead*, 2 Wend. 112.)

It is not disputed that the town of Hempstead acquired the legal title to land under water within the bounds of its patents (*Roe v. Strong*, 107 N. Y. 358), and the question is whether the disputed land falls within the boundaries of the grants to the town. The plaintiff contends that substantially one-half of the land under water in Little Neck bay was granted to the town of Hempstead ; that the plaintiff's westerly boundary line, under its patents, begins at the head or middle of Matthew Garretson's bay (Little Neck bay) at a point in the middle or furthest projection of the small peninsula known as Little Neck and runs thence on a direct north line to the sound or East river.

The defendant claims that the lands under water in this bay were never granted to the town and that the title thereto remained in the sovereign and is now in the State or its grantees. The defendant contends that the point of departure for the west boundary of the town lands is not to be found on the peninsula of Little Neck, but at the head of the bay to the east of the peninsula, and that the line runs northward along high-water mark to the sound, excluding all lands under water.

On November 16, 1644, Governor Kieft issued for the town of



App. Div.]

Seco d Department, March, 1906.

Hempstead a patent to certain named persons by which he granted to them: "A certaine quantity of land, with all the havens, harbors, rivers, creekes, woodland, marshes, and all other appurtenances thereunto belonging, lying and being upon and about a certaine place called the Great Plaines on Long Island, from the East River to the South Sea, and from a certain harbor now commonly called and knowne by ye name of Hempstead Bay, *and so westward as farr as Mathew Garretson's Bay*, to begin at the head of the said two bayes, and so to runn in direct lines, that there may be the same latitude in breadth on the south side as on the north, for them, the said patentees, actually, really and perpetually to enjoy in as large and ample manner as their owne free lands of inheritance, and as farr eastward." (Pamphlet of Law Department, City of New York, containing Colonial grants, published by Geo. L. Rives, Corporation Counsel, p. 84.)

On March 6, 1666, a patent of Governor Nicolls recited as follows: "Whereas, there is a certaine towne in the north riding of Yorkshire, upon Long Island, commonly called and knowne by the name of Hempstead, situate, lying and being on the south side of the grate plaines, having a certaine tract of land thereunto belonging, bounds whereof on the northeast side begin at the northwest part of the lands commonly called Robert Williams purchase, so running on a direct south line to the southermost part of the said lands (which by computacon is to the middle of the Great Plaines); it extends thence east to the utmost limitts of the said Plaines, and so stretcheth againe south to the sea from the northeast bounds aforementioned, *a west line being rune to the head or middle of Mathew Garretson's Bay, it makes theire north bounds; from whence, running southward to the sea; they are bounded to the west by the east limitts of the toernes of Flushing and Jamaica* and south by the sea or maine ocean." (Ibid, p. 47.)

This patent was given as a "confirmacon" of the Kieft patent, and it conveys "all the aforemenconed tract and neck of land, set forth and bounded as aforesaid, together with all havens, harbors, creekes, quarryes \* \* \* waters, lakes, rivers, fishing, hawking, hunting and fowling, \* \* \* to the said towne, tract of land and premises within the limits and bounds aforementioned described, belonging or in any wise appertaining."

In the following year, 6th of March, 1667, Governor Nicolls signed a new patent modifying the former one by including in the north bounds of the town certain lands at Matinicock on the east side of Hempstead harbor. This patent was recalled and is important only as an aid to interpreting its predecessor. (Ibid, p. 50.)

On April 17, 1685, Governor Dongan gave a patent reciting: "Whereas, there is a certaine town in Queens County, called and knowne by the name of Hempstead upon Long Island, situate, lying and being on the south side of the Great Plaines, having a certaine tract of land thereunto belonging, the bounds whereof *begin at a marked tree standing at the head of Mattegarretts Bay, and so running and thence upon a direct south line due south to the main sea, and from the said tree a direct north line to the south or east River, and so around the points of the necks until it comes to Hempstead Harbour, and so up the Harbour to a certaine barr or sandy beach; and from thence up a direct line until it comes to the marked tree on the east side of Contiagge Point; and from thence a southerly line to the utmost extent of the Great Plaines, and from thence upon a straight line to a certaine tree marked in the neck called Maskachoung; and so from thence upon a due south line to the South Sea, and the said South Sea is to be the south bounds from the east line to the west line, and the Sound or East River to be the northerly bounds as according to the severall deeds or purchases from the Indian owners and the patent from the Dutch Governor William Kieft, relacon thereto being had doth more fully and at large appear.*" (Ibid, p. 52.)

The plaintiff contends that the point described by Dongan as the "head of Mattegarrets Bay," by Nicolls as "ye head or ye middle of Mathew Garretson's Bay," and by Kieft as "the head" of Mathew Garretson's Bay, can only be found at the middle or furthest projection of the peninsula now known as Little Neck.

The defendant insists that, *ex vi termini*, the point so described must be sought at the head of one of the smaller bays into which Little Neck bay divides and that the head of the small bay on the east side of Little Neck appears to a person standing there to be the middle of Little Neck bay—an appearance which in the absence of actual survey might have been taken as fact by the draftsmen of the patents.

App. Div.]

Second Department, March, 1906.

The arguments on this point, however ingenious, appear to me inconclusive, and the location of the westerly boundary of Hempstead must be ascertained, not from these patents alone, but by reference to a series of acts, declarations and patents relating to all the boundaries of the town.

The Kieft grant in 1664 of "a certaine quantity of land, with all the havens, harbors, rivers, creekes, woodland, marshes and all other appurtenances \* \* \* from the East River to the South Sea" from Hempstead Bay "westward as farr as Mathew Garretson's Bay to begin at the head of the said two bays, and so to runn in direct lines, that there may be the same latitude in breadth on the south side as on the north," according to settled rules of interpretation, conveyed a body of land stretching across the island partly bounded by high-water mark in Hempstead bay and Matthew Garretson's bay, and did not include land under water in either of these bays. (*People ex rel. Underhill v. Saxton*, 15 App. Div. 263, 269; *affd.*, 154 N. Y. 748; *Gerard Tit. Real Est.* [3d ed.] 517; *Gould v. Hudson River R. R. Co.*, 6 N. Y. 522.)

It should be noted that the words "and as farr eastward" at the end of the description in Kieft's patent were taken as granting a tract of land running across the island equal in width to the tract already described. The northeast boundary of this tract was undetermined and became the subject of further action.

On October 10th of the year 1645, Governor Kieft gave a patent to the town of Flushing of lands "to run eastward as farr as Mathew Garretson's Bay \* \* \* being bounded \* \* \* on the eastward part thereof with the land graunted to ye plantations and towne of Hempstead, and so to runn in two direct lines into the south side of ye said Island, that there may be the same latitude in breadth on the south side as on the north side," etc. (Law Department Pamphlet, 81.)

Before the ensealing of this patent it was ordered that the "land should runne north and south but as farr as the hills."

Taking these two patents together title to the land under Little Neck bay remained in the sovereign.

On the 23d of January, 1657, the inhabitants of Flushing protested to the Governor against "the intrusion of the men of Hempstead on the East part of our boundes."

"Some overture has bene made for redresse to the late gouvernour Kiffet," but nothing was done in the business. (Documents Relating to the Colonial History of New York, vol. 14, 385.)

On May 11, 1658, an Indian deed was made to the "magistrates and inhabitants of Hempstead" for a tract of land with a western boundary, "beginning at a place called Mattagarrett's Bay and soe running upon a direct line north and south from sea to sea," etc. (Thompson's History of Long Island, vol. 2, 10.)

At a General Towne Meeting of the Town of Hempstead, December ye 14th, 1663, it was voted that: "Mr. Seamans, Mr. Jackson and Henry Persall shall fforthwith Lay out the Lands at Matthew Garrisons Bay and Eastward at Matinacock in perticuler alotments." (1 North & South Hempstead Town Records, 147, 148.)

In January, 1664, Governor Nicolls addressed a letter to the Towns of Hempstead, Flushing and Jamaica. That written to "ye Constable and Overseers of Hempstead" was as follows:

"Gent.

"The time within w<sup>ch</sup> yo<sup>r</sup> respective Pattents are to bee renewed and confirmed, drawing on, to p<sup>r</sup>vent misinformaçon Concerning the Limitts and Bounds of yo<sup>r</sup> Several Townes, and to take away all occasions of future Cavills and Contests, w<sup>ch</sup> otherwise might arise, I have thought fitt to direct you, to appoint one or more from yo<sup>r</sup> Towne, to Meete \* \* \* at Jamaica, to whom you are to give full Instructions, concerning yo<sup>r</sup> certaine Bounds and Limitts \* \* \*."

Thirty-four delegates attended this meeting, which took place at Hempstead on February twenty-eighth. (Documents Relating to the Colonial History of New York, vol. 14, 592; Lamb's History of New York, vol. 1, part 1, 227.)

On March 2, 1664, at this "generall meeting of the deputyes of Long Island held before the Governour at Hempsteed," it was ordered "that a lyne shall be drawn to runn through the middle of the hills \* \* \* between the towns of Flushing and Jamaica east and west, parallel with the lyne of Flushing, which shall be the bounds of each towne." (Law Department Pamphlet, 88.)

At the same general meeting, but on March 3, 1664, the record recites, "Whereas the towne of Jamaica doth lay claime to the Little Plaines, which the towne of Hempsteed alleadge to be within their pattent,

App. Div.]

Second Department, March, 1906.

"Now, in regard the said towne of Jamaica have for nine years past enjoyed the said Plaines without molestation, and cannot subsist without them, neither is it knowne whether they are within the bounds of Hempsteed Patent, it is this day ordered that the lyne of Hempsteed bounds being drawn from the head of Mathew Garretsons Bay (which is to say the middle of the said Bay) to run directly to the South Sea, what part of the said Little Plaines the said lyne doth not comprehend to be within ye bounds of Hempsteed shall be and remain to the towne of Jamaica, and if any part thereof shall be within the bounds of Hempsteed in regard they are sufficiently provided, and Jamaica hath great necessity thereof, upon neighborly and moderate townes (terms), the towne of Jamaica shall likewise be possessed thereof by sale or assignmt from the towne of Hempsteed." (Ibid, p. 89.)

At the same "generall meeting" in March, 1664, the line between Flushing and Hempstead was fixed and the land of Flushing was declared "to run eastward as far as Matthew Garretson's Bay, from the head or middle whereof a line is to be run *southeast in length about three miles, and two miles, in breadth,*" etc.

This appears from a recital in the Dongan charter to Flushing to be hereafter referred to.

On May 1, 1665, in pursuance of the order made at the "Generall Meeting" in March, 1664, a Hempstead town meeting "condescended" that their "Loving ffrriends, The inhabitants of Jamaica," should have "all the little Plaines which our Line doth comprehend, and all the Meadow that lyes below the little Plaines that is to say the meadow which lyes on the west side of the great River which comes out of the great Swamp." (1 North & South Hempstead Town Records, 178.)

Thus, in 1664, the boundaries of Flushing, Jamaica and Hempstead, left uncertain by the Kieft patents, had been defined and established by the English Governor at Hempstead in the presence of the Long Island deputies, and he could now proceed to issue patents accordingly.

On February 15, 1666, Governor Nicolls granted a patent to Flushing of land "to runne eastward as farr as Mathew Garretson's Bay *from the head or middle whereof a line is to be runne southeast in lengthe about three miles, and about two miles in*

breadthe, *as the line hath been surveyed and laid out by vertue of an order made at the Genall. meeting held at ye town of Hempstead* in the moneth of March, 1664; thence (that there may bee the same latitude in breadth on the south side as on the north) to runne in two direct lines southward \* \* \* as is directed by another order made at the generall meeting aforesaid wh passing east and west as the trees are now markt is the bounds between ye said towne of Flushing and Jamaica." (Law Department Pamphlet, 30.)

The town of Hempstead had conferred upon Thomas Hicks certain lands lying on Little Neck (then called Mad Nance's Neck), which neck had been "heretofore reputed to bee within the limitts of the Towne of Hempstead."

Governor Nicolls on February 20, 1666, gave Hicks a patent confirming his title and granting him all the neck, "Provided that the lotts and Plantations which shall be settled upon the said neck have relacon to the Towns of Flushing," according to the order made at the general meeting at Hempstead in March, 1664.

In March, 1666, therefore, when Governor Nicolls issued his patent to the town of Hempstead, the western boundary of Hempstead had been laid down, partly by orders of the Governor in General Assembly of the deputies of Long Island, and partly by acts of the town of Hempstead. It no longer ran from the head of Matthew Garretson's bay on a direct line southward, but ran *south-east* for three miles from Matthew Garretson's bay, where it bordered on the grant to Flushing, and further south it ran along the eastern boundary of the Little Plains which belonged to Jamaica. Governor Nicolls, at least, recognized the whole of Little Neck as having relation to the towne of Flushing. The eastern boundary of Hempstead had also ceased to be a direct line drawn north and south. The Nicolls patent follows the new east line as settled. It then says: "A west line being rune to the head or middle of Mathew Garretson's Bay, *it makes their north bounds.*"

It cannot be supposed that this line, although called a "west line," was drawn due east and west, so as to exclude the lands of Great Neck. A line running in a general westerly direction, but following the northern limits of the town along the sound, must have been intended. As to these northern limits no controversy had arisen or seemed likely to arise.

App. Div.]

Second Department, March, 1906.

The western line is given as running from the head or middle of Matthew Garretson's bay "southward to the sea; *they are bounded to the west by the townes of Flushing and Jamaica*, and South by the sea or Maine Ocean."

On November 23, 1675, Governor Andros made an order reciting that whereas in Governor Nicolls' time Cornsbury, or Little Madnan's Neck (now Little Neck), where Capt. Thomas Hicks resides, "was adjudged to bee within the Limitts of flushing, since the which the Line having been runn, It hath been found that part of the Land on the said Neck, belonging to Cap<sup>t</sup> Thomas Hicks, is within the bounds of Hempstead \* \* \* These are to declare That from and after the Date hereof, the ffarme and Land upon Cornsbury belonging to the Said Cap<sup>t</sup> Hicks shall bee deemed & held to bee within the Bounds and Limitts of Hempstead, & nor longer of flushing." (Documents Relating to the Colonial History of New York, vol. 14, 707.)

On March 23, 1685, Governor Dongan gave to the town of Flushing a "Patent and Confirmation" of the Nicolls patent, using substantially the same words of description therein found. He recited an agreement between Flushing and Jamaica, dated March 6, 1679-80, whereby the boundary line between those towns had been ascertained and continued as follows: "And whereas by another certaine writing or agreement, dated the last day of June, one thousand six hundred and eighty-fouer, made by Elias Doughty, John Seaman, Thomas Willett and John Jackson, with the bounds between the towne of Flushing and Hempstead, are to begin at the middle of the Bay *where Capt. Jacques runne the line*, and to hold the same until it comes to the land called by the name of the Governor's land, and then from the South side of the Governor's land towards the end of the Plaine to former marked tree which stands in the hollow, and to runne from thence upon a direct line until the Rocky Hill, westerly where carts usually goe to Flushing. \* \* \* And, whereas, applicacon hath been made to me \* \* \* for a confirmation of the aforesaid tract or parcell of land and premises contained in the aforesaid patent, *as it hath since been limited*, butted and bounded by the aforementioned agreements of the town of Flushing with the towns of Jamaica and Hempstead;" and the patent confirms and grants "all the before recited tract or parcell

or neck of land set forth, *limited and bounded as aforesaid* by the aforementioned patent, Indian deed of sale *and agreements.*" (Law Department Pamphlet, 35.)

When in the following month, and on April 17, 1685, Governor Dongan gave a patent to Hempstead of land bounded on the west, beginning "at a marked tree standing at the head of Mattegaretts Bay, and so running and thence upon a direct south line due south to the main sea," he was, if these words are taken literally, infringing upon the established rights and bounds of the town of Flushing.

On June 2, 1686, at a town meeting in Hempstead, the patentees and others were directed to "use their best undeaver to maintayn the Jenerall bounds of our townd both of Purchis and Pattin and as for the west bounds of our townd which is beginning at mathagarats bay hed and from thence a south line to the see and a North Line to the sound there being formerly a Contrevarsy which was the hed of the bay and at the Jenerall Metting that was held at our townd by Governor Nicols and the Cuntrys debetys the thing being then desided and ordered by the athority afforesaid that *the Middill of the said bay that is Nere the bottrum of the littell Neck should be a Counted for the Hed of the said bay* where then was a tree marked fer our west bounds between flushing and us from which tree or Please We dwo Order and impower our agents afferesaid to use their best indeavour to maintayn a south Line to the see and a North Line to the sound." (2 N. & S. Hempstead Town Records, 7, 8.)

By chapter 54 of the Laws of 1797 (amendatory of Laws of 1796, chap. 69, § 9) the town supervisors in the different counties on Long Island were directed to cause maps of their respective towns to be made and filed in the Surveyor-General's office. Pursuant to this act and in the year 1797 maps respectively of North Hempstead, Flushing and Hempstead, by Wm. M. Stewart, surveyor, were filed. The boundary between these towns runs southeast from Little Neck bay about three miles, passes the end of the Plains (now Floral Park) and goes to the "Rocky Hill," which was a point of departure for the boundary between Flushing and Jamaica. The line was thus drawn, as it had been settled in the general meeting of March, 1664, and as it now exists between the borough of Queens and the county of Nassau. The boundaries shown by these maps seem to cor-



App. Div.]

Second Department, March, 1906.

respond with the bounds of the Nicolls patents as modified and established by the agreements between Flushing, Hempstead and Jamaica recited in the Dongan patent to Flushing. It follows that the point "at the middle of the Bay where Capt. Jacques runne the line" is the point where the present boundary between Queens and Nassau reaches Little Neck bay, at the head of the small bay to the east of Little Neck.

Is this the point which the town meeting in 1686 called "the Middill of the said Bay that is *nere the bottum of the littell Neck?*" This language is not perfectly clear, but it is certain that neither the town nor Governor Andros nor Governor Dongan could, in 1676 or 1686, move this boundary westward into territory already belonging to Flushing by patent and agreement.

In 1691 August Graham filed a survey of a due south line by the compass (allowing no variation) from a certain "Burch tree marked with the letter H" near Hicks' mill. This line seems to have been run with reference to some controversy as to land in Rockaway. Graham's line fell to the eastward of one previously run by a Mr. Wells.

On May 8 and 9, 1727, Justice John Treadwell and other citizens, "pursuant to a voat made by the mager voat of the freeholders of Hempstead did aid and assist Dr. Colding ye Jeneral Survaioir of the province of Neu York. In Runing of our West Line which is our west bonds according to our purches and patians which is a direct South line due South from the head of mattheu-garisons bay to the South Sea, beginning at a burch tree at ye sd bay head." (3 N. & S. Hempstead Town Records, 88.)

Apparently from the account of the lines as drawn this survey agreed with that of Mr. Wells and not with that of Graham, who had allowed for no variation of the compass.

The map filed by Graham shows that the tree marked H used by him was on Little Neck. It does not appear by whom or when the tree was marked. To settle questions arising on the south side of the island regarding lands not affected by the agreements made as to the boundary between Hempstead and Flushing, it was apparently deemed unnecessary to take into account the line which "Capt. Jacques runne" and which had been adopted by agreement on June 30, 1684, and I do not think that the evidence furnished by the

Graham map can be taken to modify the conclusions already reached. It may be said, further, that Graham's north line (and still more Mr. Wells' north line) drawn from the marked tree on Graham's map passes eastward of high-water mark of the upland on Great Neck adjacent to the defendant's land under water, so that a north line, drawn from the tree marked by Graham, would not give the disputed premises to the plaintiff.

The Dongan patent to Hempstead, as has been said, runs "from the said tree a direct north line to the South or East River, and so around the points of the necks until it comes to Hempstead Harbour," etc.

The Kieft patent had given to Hempstead the lands from Hempstead bay "westward as far as Mathew Garretson's Bay," that is to say, the whole of Great Neck, but it appears that a straight line due north from either of the points claimed to be the head of the bay would cut off portions of Great Neck. Hence, the line could not be literally a "direct north line," and must be either a line following the shore or else a line drawn out into the bay to the west of north. Taking the point of departure as at the head of the bay east of Little Neck, where the boundary had been established by the patent to Flushing, it would be necessary to run the line almost northwest to inclose within the Hempstead boundary any considerable part of the surface of the bay. Why should such a line be described as a "direct north line?" How far into the waters of the sound should such a line be protracted before turning "around the points of the necks until it comes to Hempstead Harbour?"

A claimant under a gratuitous grant from the sovereign must bring himself within clear and unequivocal language, and the uncertainty of this line drawn to the sound seems to me fatal to the plaintiff's claim. (*Langdon v. Mayor, etc., of City of N. Y.*, 93 N. Y. 145.)

I think, therefore, that the direct "north line" is to be taken as starting directly north and following the shore of the land belonging to Hempstead in a general northerly direction, just as the "direct south line due south to the main sea" must, without doubt, be taken as running first southeast, then south, southwest and south again along the established boundary of the town of Flushing and the line which "Capt. Jacques runne."

App. Div.]

Third Department, March, 1906.

It is to be noticed that the boundaries of the town of Hempstead, as shown on Stewart's map, filed in 1797, include no land under water, nor is there evidence showing claim of title by the town before the year 1889 to any lands covered by the waters of Little Neck bay.

By chapter 231 of the Laws of 1835 Richard Udell was authorized to build a dock on the west side of Great Neck, extending into Little Neck bay not more than 400 feet beyond high-water mark. This dock was built near the lands under water occupied by the defendant, and existed for years, so far as appears without protest from the town of North Hempstead.

My conclusion is that the land under water described in the complaint is not included within the boundaries of either of the Colonial patents to the town of Hempstead, and is not shown to be the property of the plaintiff, and for this reason the complaint should be dismissed.

---

LIDA A. HALL, as Administratrix, etc., of BURT J. HALL, Deceased,  
Respondent, v. THE CAYUGA LAKE CEMENT COMPANY, Appellant.

Third Department, March 7, 1906.

**Negligence — death by explosion of dynamite — failure to show negligence of defendant — erroneous charge.**

The plaintiff's intestate, an employee of the defendant, was last seen alive going to a small house maintained by the defendant for the purpose of thawing out dynamite to be used in blasting. It was shown that the custom of thawing dynamite was usual and necessary, and that after it was thawed out in order to use it a small hole was cut in one end of the stick of dynamite and an explosive cap inserted which was secured to the stick by winding wires around it. The only negligence sought to be proved was that, if dynamite were inclosed in a metal case and heated, with no means of allowing the resulting gases to escape, an explosion was likely. It was not shown, however, that the defendant so inclosed the dynamite, but that it merely inserted an explosive cap in one end, which could not confine the gases.

*Held*, that a charge which in effect authorized the jury to find out the cause of the explosion, which cause the plaintiff had not discovered and proved to the jury, was error;

That, as it was not shown that the defendant had confined the dynamite when heating it so as to confine the gases, the evidence that it would explode if heated when so confined furnished no grounds on which the jury could impute negligence to the defendant.

APPEAL by the defendant, The Cayuga Lake Cement Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Tompkins on the 12th day of December, 1904, upon the verdict of a jury for \$3,500, and also from an order entered in said clerk's office on the 3d day of June, 1905, denying the defendant's motion for a new trial made upon the minutes.

The defendant, in the transaction of its business, is required to blast rock. This rock is blasted by the use of dynamite. This dynamite is stored in a safe reservoir out of harm's way. As it is used, however, it is required to be brought up, and, in cold weather, thawed out before it can be exploded. A little shanty was built upon the defendant's premises, near to the quarry, about twelve feet square. This shanty contained two rooms. One of them was what was called the tool room, in which the tools were kept. The other room was called the dynamite room. The dynamite room was the smaller of the two. In this dynamite room was a stove, and around the stove upon two sides were shelves about eighteen inches from the floor, upon which the dynamite was placed for the purpose of thawing it out. After the dynamite was thawed out a little hole was dug out from one end of a stick of dynamite into which was put an exploder. The apparatus containing this exploder, and containing either the fuse by which it was lighted or the wire by which it was afterwards attached to the electric battery, was called the cap. The exploder was put into the end of the stick of dynamite and in some way the wires were then wound around the end of the stick of dynamite so as to hold the exploder or cap in its place. Upon the 18th day of January, 1903, the plaintiff's intestate was last seen going toward this house where this dynamite was kept. A short time afterward a loud explosion occurred and the plaintiff's intestate was found with his body very much mutilated about thirty or forty feet from this house. This action is brought by his administratrix for damages for his death as caused by the negligence of the defendant. The jury rendered a verdict of \$3,500. From the judgment entered upon that verdict and from an order denying defendant's motion for a new trial the defendant here appeals. Further facts appear in the opinion.

App. Div.]

Third Department, March, 1906.

---

*Halliday & Denton*, for the appellant.*J. J. McGuire*, for the respondent.

SMITH, J.:

That all dynamite in cold weather is required to be thawed out before it can be used is admitted. That the method which the defendant adopted for thawing out the dynamite, of placing it beside a hot stove, is the method commonly in use, is established by the evidence. The learned trial court in charging the jury upon the question of negligence said: "The first proposition is, she must prove that the accident was caused by the negligent conduct of the defendant corporation. That is the first question which you must examine in this case. It is asserted on the part of the plaintiff that the accident occurred through the want of care by the person who was in charge of and was superintending the preparation of the dynamite in these sticks; and the plaintiff asks you to infer from the evidence in this case that in some manner not known to the plaintiff, in the preparation or in the storing of these sticks of dynamite which had been thawed near the stove, and in the absence of the superintendent, that in some manner fire or heat or something was applied to some of these sticks of dynamite and that the explosion took place and that this occurred from a want of care and caution, and negligence on the part of this man Callihan. The evidence shows that he was the only person that had the charge of this shanty and of the preparation of loading these sticks of dynamite or placing the caps in them. The plaintiff's claim is that some of these sticks were improperly capped and left upon the shelf near the stove, and the theory which has been suggested on the part of the plaintiff is that in some manner after the cap had been inserted into the dynamite and it had been secured there that the confining of certain gases caused the explosion. One witness said that if certain gases had been permitted to escape from the sticks it would have rendered the whole composition harmless under ordinary circumstances, but in some way by confining the gas in the tube closed in the manner in which they were that the explosion took place." At the close of the charge the defendant's counsel requested the court to charge "that the plaintiff cannot recover in this case if the explosion was caused in any way by gases accumulating in these sticks of dynamite. The Court: No; the

evidence of one witness is that that would cause the explosion. Defendant's counsel: There is no proof in this case that that did cause it. The Court: There is what he said about it. Defendant's counsel excepted to the refusal to charge as requested. The Court: That I leave as question of fact to the jury to determine how the explosion took place. Defendant's counsel excepted to the charge as made and to the refusal to charge as requested."

From this charge it will be seen that the jury were authorized to find out what was the cause of the explosion which cause the plaintiff had been unable to discover and prove before the jury. Aside from this, however, we are unable to find any evidence whatever which would authorize the jury to find that this explosion was caused by the confinement of gases which would come from the dynamite. The only evidence to the effect that the confinement of gases in dynamite will cause an explosion is found in the evidence of the witness Maloney. Upon that subject he swears: "To explode it by heating, it is confined in a metallic receptacle where the gases cannot escape from it." This dynamite was not confined in any metallic receptacle. This capping, so called, is fully described in the evidence by the witness Calkins, and all there is of it is the insertion of an exploder into a hole about as large as a lead pencil in the end of a stick of dynamite and fastening it there by wires wound around the end of the stick. It is apparent that the gases which would escape by reason of the heating of the dynamite are no more confined than they would be without the capping. There being no other evidence in the case as to the possibility of the explosion being caused by the confinement of gases it was clearly error for the learned court to allow the jury to say that the explosion might have been so caused and to charge the defendant with negligence therefor. It is not necessary for us to decide, therefore, whether there was sufficient evidence in any aspect of the case to authorize a recovery, or whether the rulings upon questions of expert testimony were erroneous. These questions may not be presented in another trial.

All concurred.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

App. Div.]

Third Department, March, 1906.

WILLIAM McECHRON, as Sole Surviving Executor, etc., of JONES ORDWAY, Deceased, Respondent, v. GODFREY R. MARTINE and MARY E. MARTINE, Appellants, Impleaded with Others, Defendants.

Third Department, March 7, 1906.

**Mortgage — realty and chattel mortgage securing same debt — agreement that resort shall first be had to the realty mortgage — mortgagors not damaged by violation of said agreement by sale under chattel mortgage which conveyed no interest — counterclaim for such damage properly dismissed in action to foreclose realty mortgage.**

When a chattel mortgage given as further security for a debt secured by a mortgage on real estate covers only the personal property "which belongs to us (the mortgagors) in any of the said buildings" and provides that resort shall first be had to the realty mortgage to collect a debt, a sale under such chattel mortgage before an action to foreclose the realty mortgage, which sale only purported to convey the interest of the mortgagors, and they having no interest, does not furnish grounds for a counterclaim in a subsequent action to foreclose the realty mortgage. As the chattel mortgagors had no title at the time of the mortgage, and as only their interest in said chattels was sold, nothing passed to the purchaser, and hence the mortgagors were not damaged by the apparent breach of the agreement to resort first to the realty mortgage.

APPEAL by the defendants, Godfrey R. Martine and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Warren on the 6th day of May, 1905, upon the report of a referee.

The action was brought for the foreclosure of a mortgage. The mortgage was executed by Godfrey R. Martine and Mary E. Martine upon four several pieces of real estate described therein to Jones Ordway, to secure an indebtedness which, upon April 23, 1901, amounted to upwards of \$8,000. This mortgage was executed upon the 10th day of January, 1889. This plaintiff is the surviving executor of Jones Ordway, deceased. In August, 1899, the same defendants executed a chattel mortgage *upon what they owned* of certain personal property at Blue Mountain lake in the hotel and cottages adjoining. This chattel mortgage was executed to William McEchron and James M. Ordway, as surviving executors of Jones Ordway, deceased, and was for the purpose of securing the same indebtedness which at that time purported to be secured by the real

estate mortgage. This chattel mortgage was in the ordinary form, but contained this further clause: "If it shall become necessary to enforce by action the collection of the notes which this mortgage is given to secure resort shall first be had to the property covered by a certain mortgage (real estate) bearing date January 10, 1889, made and executed by Godfrey R. Martine and Mary E. Martine to Jones Ordway, recorded in the office of the clerk of the county of Hamilton on the 14th day of January, 1899, and in the office of the clerk of the county of Warren on the first day of November, 1890, and then to the property hereby transferred and herein described." It afterwards developed that at the time of the giving of the mortgage the mortgagors were not the owners of two of the pieces of property described in the real estate mortgage. A third piece of property was afterwards deeded by the mortgagors and the lien of the mortgage released by plaintiffs. The mortgage remains, however, a lien upon the remaining piece of property described in the mortgage, and the purpose of this action was to foreclose this mortgage as to this piece of property. The court has found that the personal property at Blue Mountain lake was not at the time of the giving of the chattel mortgage the property of the mortgagors, but was the property of J. Edwin Martine, a brother, and that nothing passed by virtue of the chattel mortgage thus given to the plaintiffs.

On the 23d day of April, 1901, the plaintiff, assuming to act under his chattel mortgage, sold at the front door of the Blue Mountain Lake Hotel all the interest of the defendants Godfrey R. Martine and Mary E. Martine in the personal property in such hotel and in the cottages adjoining. Just prior to the sale the plaintiff's attorney, acting in the plaintiff's behalf, received a telegram which was sent by the said Godfrey R. Martine and Mary E. Martine, as follows:

"GLENS FALLS, N. Y., *April* 23, 1901.

"To HENRY W. WILLIAMS,

"Blue Mountain Lake, N. Y.:

"I have owned all household goods and other personal property on Blue Mountain Lake house premises since June, 1890, and I hereby forbid sale of the same unless your claim antedates mine.

"J. EDWIN MARTINE, Chicago,

"By GODFREY R. MARTINE."



App. Div.]

Third Department, March, 1906.

In disregard of this telegram the interest of the defendants Godfrey R. Martine and Mary E. Martine were sold upon that day for about the sum of \$500, which full sum has been credited upon the plaintiff's claim under this real estate mortgage.

In this action to foreclose this real estate mortgage the defendants Godfrey R. Martine and Mary E. Martine admitted the execution and consideration thereof and asserted an affirmative defense or counterclaim for damages by reason of the unauthorized sale of this personal property under this chattel mortgage. Defendants contend that under the terms of the chattel mortgage resort must first be had to the real estate mortgage. Evidence was offered by the defendant of the actual value of the personal property at Blue Mountain lake whereupon the following statement was made upon the trial by the plaintiff's counsel.

"In the view which we take of this action, the question of damages is not going to be a material one, and we have agreed to allow the defense to swear one witness as to the value of the personal property, and no other evidence is to be put in on the value except that given by this witness, and we also have agreed upon this stipulation between the parties :

"That the plaintiff shall offer no evidence as to the value of the personal property set forth in the counterclaim and bill of particulars herein ; that in the event that the referee finds that the defendants or either of them are entitled to recover upon said counterclaim, that then such recovery shall go to extinguish the claims of the plaintiffs against the defendants so that one shall balance the other, and that no judgment for damages shall be entered in favor of either party, and the excess in favor of defendants or either of them is hereby waived and released ; that the plaintiffs waive the objection heretofore taken that this counterclaim should have been asserted against them in an action brought against them individually, instead of in a representative capacity, and shall not assert the same as a defense to this action. That if it is found that the defendants are entitled to recover upon the facts stated in said counterclaim against these plaintiffs, either individually or as executors, they shall recover against these plaintiffs as executors in this action, upon the same."

The referee has found that Godfrey R. Martine and Mary E. Martine had no interest in nor possession of the said chattels at the

time of the giving of the mortgage or at the time of the sale by the plaintiffs under their chattel mortgage, and has dismissed the defendants' counterclaim and directed judgment for the foreclosure of the plaintiff's real estate mortgage. From the judgment entered upon this decision the defendants Godfrey R. Martine and Mary E. Martine have here appealed.

*King & Angell* [*Joseph A. Kellogg* of counsel], for the appellants.

*Ashley & Williams* [*Henry W. Williams* of counsel], for the respondent.

SMITH, J. :

We agree with the defendants' contention that a sale under the chattel mortgage was unauthorized until the foreclosure of the real estate mortgage. The technical construction which plaintiff's counsel claims for the stipulation in the chattel mortgage, above quoted, practically takes the life out of the stipulation and nullifies its effect. A fair interpretation of that stipulation in that mortgage would require the satisfaction of the claim as far as possible out of the real estate mortgage before the chattel mortgage could be resorted to for aid in its payment. The fact found by the referee, that the personal property at Blue Mountain lake was in 1890 conveyed to J. Edwin Martine, and that at the time of the giving of the chattel mortgage and upon April 23, 1901, at the time of the attempted sale thereunder the defendants Godfrey R. Martine and Mary E. Martine, had no interest therein, is supported by the evidence. The inference is quite clear that here was a transfer of this property for the purpose of evading the creditors of Godfrey R. Martine, but such a transfer is good as between the parties, and the title to the property at all these times has, therefore, been and now is in J. Edwin Martine, who is not one of the defendants who asserts any counterclaim in this action. This property, however, as well as the real estate at Blue Mountain lake, which had been conveyed to a daughter, Mary J. Martine Fletcher, were clearly in the possession of the defendants Godfrey R. Martine and Mary E. Martine. They were left in their possession both by the daughter and by the brother who held the legal title to the property. This right of possession would give to these defendants a right of action

App. Div.]

Third Department, March, 1906.

for a conversion of that property. The right of the possessor to sue for the conversion of property a third person who does not connect himself with the legal title is well established. He stands, however, as the trustee for the legal owner as to any recovery in such an action.

But this personal property was never converted by the plaintiff. Its possession was in no way changed. No dominion was exercised thereover. This telegram was read at the sale, and the title which was in fact sold was simply the title of Godfrey R. Martine and Mary E. Martine. In fact the chattel mortgage is peculiar in mortgaging only that part of the chattel property "which belongs to us in any of said buildings or on said premises." Under the findings of the referee no property passed by the mortgage. No property, therefore, passed under the mortgage sale, and the April trip of the plaintiff's attorney, and his pretended sale at Blue Mountain lake, was a harmless incident which damaged no one, and cannot be made the basis of any counterclaim by the defendants in this action. The estoppel claimed by the defendants as against the plaintiff by reason of the attempted sale under the mortgage has scant support when the mortgage purports to convey only such part of the property as belongs to the defendants. We see no reason, therefore, for disturbing the conclusions of the referee, and the judgment should be affirmed, with costs.

Judgment unanimously affirmed, with costs; KELLOGG, J., not sitting.

---

CHARLES CLIFFORD, Appellant, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respondent.

Third Department, March 7, 1906.

**Negligence — injury by bundle of newspapers thrown from moving train — evidence — error in excluding evidence of custom of railroad to permit throwing of papers.**

In an action to recover damages for injuries received by plaintiff, who was struck by a heavy bundle of newspapers thrown from the defendant's train running at a high rate of speed, it is error to exclude evidence offered by the plaintiff of a custom of the defendant to allow news agents to throw such bundles of papers from its moving trains, as a railroad company permitting it is liable for the injuries caused thereby.

APPEAL by the plaintiff, Charles Clifford, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Rensselaer on the 31st day of May, 1905, upon the dismissal of the complaint by direction of the court after a trial at the Rensselaer Trial Term.

The plaintiff was at work upon the sidewalk in front of an hotel at Castleton, N. Y. Upon the opposite side of the highway ran the defendant's road. Upon June 19, 1904, while the plaintiff was thus at work, one of the defendant's trains passed through Castleton. From this train was thrown a bundle of Sunday New York newspapers, which struck the ground with great force and, rebounding, hit the plaintiff, knocking him down on the brick walk and rendering him unconscious. This bundle of papers weighed about seventy-five pounds and was thrown while the train was thus running at the rate of about sixty miles per hour. For the injury thus received the plaintiff has sued the defendant company. Upon the trial the plaintiff's complaint was dismissed. From the judgment of dismissal the plaintiff has here appealed.

*Martin A. Springsteed*, for the appellant.

*William P. Rudd*, for the respondent.

SMITH, J.:

In *Dwyer v. President, etc., D. & H. Canal Co.* (affirmed in this department without opinion, 17 App. Div. 623) plaintiff was walking along a highway adjoining a railroad and was struck by a bundle of papers which was thrown from a passing train by a person who was not an employee of the railroad company but was an employee of a news company which was accustomed to take its papers over this road and employed a man for the purpose of putting them off at different stations. In that case Justice ALTON B. PARKER, at the Trial Term, submitted to the jury the question as to whether it was the custom thus to throw these papers from the moving train, and as to whether that custom was known to the railroad company, charging that if the defendant in that case knew of that custom and permitted it, it thereby became liable to the plaintiff for any damages suffered by him therefrom. The jury found a verdict for the plaintiff, and the judgment entered thereupon was unanimously affirmed in this court.

The defendant seeks to distinguish that case from the case at bar by claiming that there is no proof here of the existence of any custom of throwing off these papers which was known to the defendant company. That is probably so. The lack of proof, however, seems to have been due to an erroneous ruling of the trial judge in rejecting such testimony when offered. John H. Porter was called as a witness for the plaintiff, and swore that he purchased Sunday papers and received them by this train. He swears that he was down to the train and signaled to the man to throw off the papers where he stood. It is unnecessary to repeat here the colloquy that occurred between the counsel and the court, during which questions were asked by plaintiff's counsel tending to show such custom, and upon objection made the evidence was excluded. The final question was asked, "When have you seen your papers thrown off there Sunday mornings previous to June 19, 1904?" This was objected to as before, objection sustained and exception. Plaintiff's counsel thereupon stated: "If your Honor please, if this had been a custom there of throwing off papers, and the papers had come up there before, I think it is competent to show they did this as a habit repeatedly. If they were only thrown up there on this brick walk once it would be a different thing. I desire to show it for that purpose, and for that purpose I ask the question and you give me an exception." The court: "You have already asked it and have already taken an exception." After this ruling it would seem to have been an impertinence for plaintiff's counsel to further persist in placing such evidence before the court. We are unable to distinguish this case in principle from the case heretofore decided by us, and upon the doctrine of *stare decisis* must reverse the judgment and order a new trial. (See, also, *Snow v. Fitchburg Railroad Company*, 136 Mass. 552; *Galloway v. Chicago, M. & St. P. Ry. Co.*, 56 Minn. 346; *Ohio & Mississippi Ry. Co. v. Simms*, 43 Ill. App. 260.)

All concurred.

Judgment reversed and new trial granted, with costs to appellant to abide event.

**KNICKERBOCKER TRUST COMPANY, as Trustee, Respondent, v. ONEONTA, COOPERSTOWN AND RICHFIELD SPRINGS RAILWAY COMPANY and Others, Defendants, Impleaded with DANIEL M. LOUNSBURY and Others, as Executors, etc., of JOHN W. LOUNSBURY, Deceased, Appellants.**

Third Department, March 7, 1906.

**Parties — objection to defect of parties defendant must be taken by demurrer or answer — proper practice stated — objection cannot be made by motion.**

When a defect of parties appears upon the face of the complaint the defendant may demur thereto, and if the defect does not appear upon the face of the complaint, the objection may be taken by answer. A failure to take such objection by demurrer or answer is a waiver of the defect. (Code Civ. Proc. §§ 488, 498, 499.) But even though the objection be so waived the court on its own motion may direct parties to be brought in if a complete determination of the controversy cannot be had without their presence. (Code Civ. Proc. § 452.) But an objection to defect of parties must be made by demurrer or answer and cannot be made by motion.

**APPEAL** by the defendants, Daniel M. Lounsbury and others, as executors, etc., of John W. Lounsbury, deceased, from an order of the Supreme Court, made at the Otsego Special Term and entered in the office of the clerk of the county of Otsego on the 9th day of January, 1906, denying the said defendants' motion that certain other persons be made parties defendant in this action.

This is an action to foreclose a mortgage made by the defendant Oneonta, Cooperstown and Richfield Springs Railway Company to the plaintiff, as trustee, to secure the payment of bonds of such company. The appellants are the owners of some of such bonds and have intervened as parties defendant herein. They interposed an answer, among other things, alleging a defect of parties defendant in that certain other persons, naming them, were owners of some of the bonds and necessary and proper defendants, and that without their presence a complete determination of the controversy could not be had. Subsequently the appellants moved at Special Term to require the plaintiff to make such persons parties defendant herein. From an order denying such motion this appeal is taken.

*Henry C. Henderson* and *William A. Davidson*, for the appellants.

*Charles E. Hotchkiss* and *Joseph F. Collins*, for the respondent.

COCHRANE, J. :

The motion was properly denied. Section 488 of the Code of Civil Procedure provides that where there is a defect of parties appearing on the face of the complaint the defendant may demur thereto. Where such defect does not appear on the face of the complaint the objection may be taken by answer; and if such an objection is not taken either by demurrer or answer the defendant is deemed to have waived it. (Code Civ. Proc. §§ 498, 499.) Even if the objection is not taken by demurrer or answer the court must on its own motion in a proper case where a complete determination of the controversy cannot be had without the presence of other parties direct them to be brought in. (Code Civ. Proc. § 452.) "Construing sections 452 and 499 together, their meaning is that a defendant, by omitting to take the objection that there is a defect of parties by demurrer or answer, waives on his part any objection to the granting of relief on that ground, but when the granting of relief against him would prejudice the rights of others, and their rights cannot be saved by the judgment, and the controversy cannot be completely determined without their presence, the court must direct them to be made parties before proceeding to judgment." (*Osterhoudt v. Board of Supervisors of the County of Ulster*, 98 N. Y. 243; *Steinbach v. Prudential Ins. Co.*, 172 id. 476.)

Whether the parties sought by the appellants to be brought into the action were proper or necessary parties was a question to be determined by the court on the trial of the action. Such question was not properly raised by motion. The appellants pursued the proper practice in raising such question by answer, and were at liberty on the trial to litigate the issue thus raised, at which time the court would have properly disposed of the question having reference to the facts as then established. A defendant, however, cannot by motion dictate to a plaintiff whom the latter shall make defendants, thereby subjecting the plaintiff to the burden and perhaps the costs of a litigation with some third party which may possibly prove to be unsuccessful. Plaintiff has a right to select his

own defendants, subject to the right of a defendant to raise the objection by demurrer, or answer that the proper parties are not before the court. Plaintiff may then, unless he prefers to bring in such parties, litigate with the defendant the question as to the propriety of the presence of such parties.

The order should be affirmed, with ten dollars costs and disbursements.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

---

EUGENE D. SORIBNER, as Committee of the Estate of MARGARET E. BERRY, a Lunatic, Appellant, v. GEORGE YOUNG and ADELBERT YOUNG, Respondents.

Third Department, March 7, 1906.

**Lunatic — committee cannot authorize sale of timber on lands of lunatic without permission of court — committee entitled to recover value of timber so cut, although the defendant has paid therefor to the husband and son of the lunatic.**

The committee of a lunatic cannot alien, mortgage or otherwise dispose of the real property of the lunatic, except to lease it for a term not exceeding five years, without the special direction of the court obtained in proceedings brought for that purpose.

Hence, persons who have cut timber on the lands of a lunatic under an unauthorized contract with her husband and son, and with the permission of the committee, are liable for the value thereof to the successor of said committee, although they have paid therefor in good faith to the husband and son. In such case a verdict for the plaintiff should be directed.

As the committee has no power to authorize the cutting of the timber so he has no power to authorize the purchasers to pay the value thereof to third persons.

APPEAL by the plaintiff, Eugene D. Scribner, as committee of the estate of Margaret E. Berry, a lunatic, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Fulton on the 5th day of July, 1905, upon the verdict of a jury, and also from an order entered in said clerk's office on the 28th day of June, 1905, denying the plaintiff's motion for a new trial made upon the minutes.



App. Div.]

Third Department, March, 1906.

This is an action to recover damages for cutting and removing trees and timber growing on the farm of the said incompetent person Margaret E. Berry. At the time of the acts complained of, Jerome Eggleston was the committee of her estate. He has since died, and the plaintiff, having been appointed his successor, brings the action. On the trial the defendants admitted the acts complained of or some of them, but sought to justify them by reason of an alleged authority of the committee.

From the testimony of the defendants it appeared that they made contracts with Samuel P. Berry, the husband, and with Arthur Berry, the son of the incompetent person, to cut and remove such wood and timber. Before acting under such contracts one of the defendants saw Eggleston, the committee, and after informing him of his conversation with Berry about cutting wood asked the committee if he had any objection, to which the latter replied, "No, sir, anything you do with Berry is all right." There was also evidence that the committee permitted Berry, the husband, to manage the farm and to do with it as he desired. The latter did not reside on the farm, but had a cottage there, and went there every season for a time and to a certain extent worked the farm.

After said conversation with the committee the defendants cut and removed the wood and timber in question. Some they divided with the husband and son of the incompetent person and paid them the balance thereof. The committee received nothing for the wood or timber thus removed, nor has the estate of the incompetent person received any benefit therefrom, nor was any of the same used by any person on the farm.

On the trial at the conclusion of the evidence plaintiff moved for a direction of a verdict in his favor, which motion was denied and exception taken.

*Eugene D. Scribner*, for the appellant.

*Clark L. Jordan*, for the respondents.

COCHRANE, J. :

The legal title to the property in question remained in the incompetent person, notwithstanding the appointment of the committee. Such committee was merely the custodian or bailiff of the property

and had no interest therein or independent power to dispose of the same in any manner whatever. It was his duty to preserve the property and not to dispose of it, except by order of the court. (*Kent v. West*, 33 App. Div. 112; *Matter of Otis*, 101 N. Y. 580, 585; *Pharis v. Gere*, 110 id. 336.)

"A committee of the property cannot alien, mortgage or otherwise dispose of real property, except to lease it for a term not exceeding five years, without the special direction of the court obtained upon proceedings taken for that purpose." (Code Civ. Proc. § 2339.)

"The committee thus becomes merely the officer or agent of the court and has no authority except such as comes from that source or is vested in him by statute." (*Pharis v. Gere*, 110 N. Y. 336, 347.)

The committee being without power to sell the wood in question he was equally without power to authorize the sale by any other person. It follows that the cutting and removal of the wood by defendants was without any lawful authority.

Defendants claim that even if their acts were unlawful the committee had power to settle with them and that they have paid the husband and son of the incompetent person by authority of the committee. The only authority to pay these third parties was such as was implied from the committee's unauthorized consent that the defendants might contract with them for the removal of the wood. Berry and his son were not the lawfully authorized agents of the committee to make the sale, for the reason that such sale was beyond the power of the committee. And the payment to them was no more lawful than the sale by them. The entire transaction was beyond the power of the committee, and, therefore, void. Although the defendants probably acted in good faith, they and Berry and his son were all wrongdoers, and the defendants cannot claim exemption from their wrongful acts because they made payment to those jointly concerned with themselves in the same wrongful acts. The payment did not reach the committee, or benefit in any respect the estate which he represented.

Nor was there any contingency or circumstance which rendered it proper that the wood should be sold. Had there existed any reason therefor the court, on presentation to it of the proper facts,

App. Div.]

Third Department, March, 1906.

would have ordered such sale. (*Matter of Salisbury*, 3 Johns. Ch. 347.) But no such claim is made.

The court submitted the case to the jury on the theory that if the defendants had the consent of the real owner of the farm to cut the trees, and acted in good faith in so doing, they were entitled to a verdict. The real owner was the incompetent person, who could not consent; the committee had no power to consent, and the good faith of the defendants, however great, cannot be permitted to diminish the estate of this incompetent person. Plaintiff was entitled, as a matter of law, to recover, and his motion that a verdict be directed in his favor should have been granted.

The judgment and order must be reversed and a new trial ordered, with costs to the appellant to abide the event.

All concurred; KELLOGG, J., not sitting.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

---

THE TOWN OF WALTON, Respondent, v. HUGH ADAIR, Appellant.

Third Department, March 7, 1906.

**Municipal corporations — treasurer of Delaware county not authorized to pay over to towns taxes received from railroads — failure of said treasurer to show that town received the benefit of such payment — Laws of 1903, chapter 515, unconstitutional as applied to this case.**

The payment by the treasurer of the county of Delaware to the supervisor of the town of Walton of the taxes received from the New York, Ontario and Western Railroad Company on its assessment in said town, exclusive of taxes for school district and highway purposes, was illegal, as by section 13 of the General Municipal Law such moneys were required to be applied to the redemption of the outstanding bonds of said town issued to aid in the construction of said railroad.

The town is entitled to recover said moneys from the county treasurer.

In an action to recover such moneys the burden is on the defendant to show that the town has had the benefit of the moneys when he seeks to justify the payment to the supervisor on such grounds. Such burden of proof is not sustained when it appears that the moneys paid to the supervisor by the county

treasurer were mingled by him with other moneys in his hands and that the moneys expended by said supervisor for the town were less in amount than the other funds he had at his disposal for such purpose, exclusive of said railroad taxes.

Laws of 1903, chapter 515, amending section 12 of the General Municipal Law, validating payments theretofore made in good faith by the treasurer of any county to any town of taxes received from railroad corporations is unconstitutional and in violation of section 10 of article 8 of the State Constitution when it has the effect of extinguishing existing causes of action.

Decisions apparently to the contrary were made prior to the adoption of said clause of the Constitution.

APPEAL by the defendant, Hugh Adair, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Delaware on the 4th day of September, 1905, upon the decision of the court rendered after a trial at the Delaware Special Term.

This case on a former appeal is reported in 96 Appellate Division, 75, reference to which report is made for a detailed statement of the facts herein.

*C. L. Andrus*, for the appellant.

*E. H. Hanford*, for the respondent.

COCHRANE, J. :

The defendant, as county treasurer of Delaware county, paid to the supervisor of the plaintiff on the 30th day of January, 1900, \$2,062.14, being the taxes received from the New York, Ontario and Western Railroad Company on its assessment in said town of Walton, exclusive of taxes for school district and highway purposes. Of this amount \$415.26 was for county purposes, and on the previous appeal to this court it was held that the same was properly paid by the defendant to the supervisor. The remainder of the amount received by the defendant from the railroad company as above stated, being \$1,646.88, was required by section 12 of the General Municipal Law (Laws of 1892, chap. 685, as amd. by Laws of 1893, chap. 466) to be devoted by the defendant in the manner provided by said section for the purchase and redemption of the outstanding bonds of the plaintiff which had been issued in aid of the construction of said railroad. The payment of this amount

App. Div.]

Third Department, March, 1906.

of \$1,646.88 by the defendant to the supervisor was, therefore, unauthorized and illegal, and for this amount, with interest, the trial court found that the defendant is liable.

The defendant disputes his liability on the ground that the town has had the benefit of this money. This contention is based largely on the argument that no allowance was made in the tax levy of 1899 for the setting aside of this fund, the full amount of which was necessary for the payment of the town liabilities of that year and that all such liabilities had been paid and that the town had no revenue or income except from taxation. Such conclusion, however, does not necessarily follow from the premises. It does not appear when all of the town liabilities were paid. Such liabilities may have been paid from other moneys of the town arising from taxation. The burden was on the defendant to prove that the town had received the benefit of the money in question. Payment of the said sum of \$2,062.14 was made to the supervisor by the defendant in two checks of \$262.14 and \$1,800. The proceeds of the former check were received in cash by the supervisor personally and no attempt was made to trace such proceeds. The \$1,800 check was deposited in the bank to the credit of the account of the supervisor, the proceeds thereof being mingled with other funds of the town. Against this account the supervisor drew checks in payment of claims against the town and also for his individual purposes. The trial court has found as facts that the amounts so drawn from said bank in payment of the claims against said town were less than the said deposit of town moneys in said bank exclusive of said deposit of said \$1,800 check; that no part of the sum of \$1,646.88 paid to the supervisor by the defendant as county and State taxes was used by the supervisor in the payment of claims against the town and that the town never received any benefit therefrom, but that the said sum of \$1,646.88 was appropriated by the supervisor for his individual purposes. The evidence is sufficient to sustain these conclusions of the learned trial court.

The defendant further insists that by chapter 515 of the Laws of 1903, passed since the commencement of this action, amending section 12 of the General Municipal Law, the payment in question to the supervisor was legalized. This contention was considered and answered adversely to the defendant on the former appeal. He,

however, insists that this question was then improperly decided and calls our attention to the case of *Mayor, etc., v. Tenth National Bank* (111 N. Y. 446). In that case the defendant had without legal authority made advancements for the construction of the county courthouse in New York county, some of which moneys thus improperly advanced had been misappropriated by one or more of the officers to whom the advancements were made. Chapter 9 of the Laws of 1872 authorized the city comptroller to pay back to the defendant and other banks similarly situated all moneys advanced by said banks prior to a certain day, to or for the use of any of the departments or commissioners of the city or county of New York. It will be observed that the act of 1872, which the court had under consideration in that case, was passed before the adoption of the constitutional provision that "no county, city, town or village shall hereafter give any money or property or loan its money or credit to or in aid of any individual, association or corporation." This constitutional provision was first adopted in 1874 and went into effect on January 1, 1875, and now is a part of section 10 of article 8 of the present State Constitution. In *Matter of Greene* (166 N. Y. 493) the case of *Mayor, etc., v. Tenth National Bank* was distinguished as having reference to an act passed before the constitutional provision above referred to, the court saying that the case last cited was decided in 1888, but involved an act passed prior to 1875, and that the constitutional amendment referred to took effect in 1875. The town has a cause of action against the defendant. This cause of action is property. The construction of the act of 1903, as contended for by defendant and as applied to this action, would result in giving to the defendant this cause of action or property which belongs to the town, and, therefore, this contention of the defendant is within the constitutional prohibition above set forth.

The judgment should be affirmed, with costs.

Judgment unanimously affirmed, with costs.

**EMMA DECKER, Respondent, v. ABRAM HUNT, Appellant.**

Third Department, March 7, 1906.

**Trespass by cutting timber — reservation of right to cut timber construed — when no time set timber must be removed within reasonable time — when such right not acquired by prescription.**

In an action for trespass upon plaintiff's land by cutting and taking timber therefrom it was shown that plaintiff's predecessor in title, one M., in 1856, had conveyed the farm by contract and subsequent warranty deed containing a reservation in these words, "excepting and reserving the standing timber on the south end of farm \* \* \* and the right of way to and therefrom." The lands came to the plaintiff by several mesne conveyances containing similar reservations. It was shown that one of the intermediate owners of said land had agreed with the grantee of other lands from the original owner that the timber should be removed under said reservation within four years.

*Held*, that when the grantor of lands has reserved the right to remove timber therefrom, and no time is specified in which to remove it, a reasonable time only is intended;

That the reservation aforesaid must be construed to mean that the grantor or his successors in title must remove the timber within a reasonable time, and that at the expiration of such reasonable time the timber remaining became the property of the grantee;

That under the circumstances said reasonable time had expired, and that the plaintiff was entitled to recover for the timber cut by the defendant;

That, although the defendant's predecessors in title had resided upon the lands received from the original grantor for twenty-six years, and during that time had taken wood and timber under the so-called "reservation," such fact was insufficient to establish a right to take such timber by prescription;

*Held*, further, that the acquiescence of plaintiff's predecessors in title in the taking of such timber by the defendant's predecessors in title did not bar the plaintiff from insisting that the defendant must cease from taking such timber after the reasonable time to remove the same had expired.

**APPEAL** by the defendant, Abram Hunt, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Delaware on the 20th day of December, 1904, upon the report of a referee.

The plaintiff commenced this action against the defendant for trespassing upon her lands and cutting and taking timber therefrom. The action was referred to a referee, who rendered a report in favor of the plaintiff, and from the judgment entered thereon this appeal is taken.

*O' Connor & O' Connor*, for the appellant.

*F. M. Andrus*, for the respondent.

PARKER, P. J. :

The plaintiff upon this appeal may claim that the following facts have been established :

In 1856 Charles More was the owner of two farms, the dividing line between them running nearly north and south. On April 10, 1856, he contracted to sell the westerly of such farms, describing it by metes and bounds, to one Bloomburg. Such contract contained a reservation of the timber on the south end of the farm. Just what its phraseology was is not certain, as it has been lost; but it is not very material as that contract, having been assigned from Bloomburg to one Powell, More, on December 1, 1860, in pursuance and satisfaction thereof, conveyed the farm to Powell by a warranty deed dated on that day, in which is contained an exception in these words: "Excepting and reserving the standing timber on the south end of farm adjoining Rufus W. Baker and the right of way to and therefrom." Powell resided on the farm for several years and then conveyed it to one Lawrence Conro by a warranty deed, containing an exception of the said timber in the same language as above. Lawrence the next year, viz., on May 1, 1866, conveyed to Isaac Conro by a warranty deed containing the same exception and in the same language as above stated. Thus in May, 1866, the title and possession of the westerly *farm* had passed to Isaac Conro, but evidently he had not acquired any title to the "standing timber" on the south end thereof.

On September 27, 1856, the said More contracted to sell and convey to one Hiram Conro the easterly farm above mentioned, describing the same by metes and bounds, and such contract also contained the following clause: "The said More hereby conveys to said Conro all his right to the *wood* on the south end of the farm, by reason of a reservation of the same in a contract of sale of land made on or about the 10 day of April, 1856, to Wilson Bloomburg." This contract was signed by More, was witnessed and was under seal. Conro went into possession of such easterly farm, and on December 1, 1860, More executed to him a conveyance of the same by a warranty deed of that date. There was no mention,



App. Div.]

Third Department, March, 1906.

however, in such deed of the wood mentioned in such contract. Hiram Conro resided on such easterly farm until April 10, 1876, and then conveyed the same to one Stephen Peckham, and in such conveyance was included the following provision: "Also all the wood on the south end of a farm now owned by Isaac Conro by reason of a reservation of the same in a deed of the farm Isaac Conro now owns from Charles C. More to Wilson Bloomburg and by virtue of a contract between the party of the first part (Hiram Conro) and Charles C. More, dated September 27, 1856, which I have this day assigned to the party of the second part (Stephen Peckham). The party of the second part has at all times the right to enter upon the said wood lots for the purpose to cut, get, draw timber or wood off from said lot."

Thus it appears that when Isaac Conro became the owner of the westerly farm in 1866, Hiram Conro, who was his father, owned and occupied the easterly farm, and claimed to own, and did own, under the provision in his contract from More whatever wood or timber More had excepted in his conveyance to Powell; and it is plain that up to this time he had taken off from such south end of the westerly farm both timber and wood whenever he desired. After Isaac became the owner he stated to his father that he wanted a stated time fixed when the timber was to be taken off, and it was then agreed that it should be all removed in four years. Isaac Conro testified that after the expiration of four years his father took no more wood or timber from there while he owned the place, and that it was substantially all taken off during that four years. He, however, testifies further that he thinks his father left on the place about twenty-five first-growth trees that he did not take off. Isaac's evidence that his father took no timber off of the place after the expiration of the four years is contradicted by several other witnesses, but the referee has found that by mutual agreement between Isaac and his father, Hiram Conro, the rights of Hiram under the reservation were terminated. As bearing upon this question, it also appears that subsequent owners of the east farm have actually taken off timber and wood from the south end of the west farm to the knowledge of its owners.

Isaac Conro resided on such westerly farm from May 1, 1866, until April, 1879. The farm was then sold by a referee on the

foreclosure of a mortgage given by said Isaac, and a referee's deed thereof given to Hannah E. Martin dated April 24, 1879. Such deed described the westerly farm by metes and bounds, but made no reservation of and no reference to the timber on the south end. Such lot was subsequently conveyed by several mesne conveyances, and on April 23, 1896, became vested in one Agnes Cronk, and in none of such conveyances was there any mention made of the timber on its south end. On March 1, 1897, said Agnes Cronk conveyed the said westerly lot by a warranty deed dated on that date to Emma Decker, this plaintiff, who took possession of the same and has since resided thereon. Her conveyance contained the following reservation: "Also subject to a reservation of certain timber on a portion of said premises by Charles More, according to the terms of said reservation."

It is for the cutting of some twenty trees, which the defendant claims under such reservation, that the plaintiff has brought this action.

When Hiram Conro conveyed the easterly farm and the wood on the south end of the westerly farm to Stephen Peckham by deed dated April 10, 1876, John Peckham, such grantor's son, moved onto such premises and continued to reside there until he conveyed them to this defendant, being a period of twenty-six years. During all that time he and his father took wood and timber off of the "reservation," so called, whenever they wanted to, and when he conveyed to this defendant on April 1, 1902, he pointed out to the defendant the "reservation" and explained it to him. Each of the deeds from Stephen to John Peckham and from John Peckham to Abram Hunt, this defendant, contained the grant of the wood, etc., in the same language specified in the deed to Stephen Peckham, as above quoted. And thus the defendant claims the right to take the trees in question by virtue of the exception thereof which Charles More made in his deed to Powell dated December 1, 1860, and by virtue of the ownership thereof, which through the several above-mentioned mesne conveyances has been transferred from said More to him.

The trees in question grew upon lands owned by the plaintiff, and they were in her possession when cut and taken therefrom. *Prima facie*, therefore, the defendant is liable to the plaintiff for

App. Div.]

Third Department, March, 1906.

their value, and this judgment against him must be sustained unless he has shown a justification for such taking. The substance of the justification set up in his answer is, that he had purchased the right to take the same by the deed from John Peckham, given him April 1, 1902, and above referred to, and that the plaintiff never had any title to such trees.

Did the defendant acquire the right to take such trees by the deed through which he claims?

We must, I think, assume that the reservation made by More, when he contracted to Bloomburg, was of the "*standing timber*" only, for that is all that he excepted and reserved in his conveyance to Powell, which was given in performance of such contract; and conceding that all which he so excepted and reserved was transferred and *conveyed* to Hiram Conro by the contract executed on September 27, 1856, we can only assume that by the phrase "wood," therein used, only "*standing timber*" was intended. Assume, then, that Hiram Conro, by such contract, became the owner of the "standing timber" then on the south end of the farm that is now owned by the plaintiff, and that he then also acquired "the right of way to and therefrom," the question is presented whether he thereby acquired the right to *forever* keep and maintain such standing timber on the premises, with the continuing right to take it, or any part of it, off whenever he or his grantees might desire, or whether he or his grantees were not required, under such a title, to remove such "timber" within a reasonable time thereafter, no definite and particular time having been specified.

I cannot agree with the referee that the reservation was operative to More only. The title to the timber was "excepted" from the operation of the deed to Powell and remained in him (More), but I think that the plain intent of the parties was that such timber should be removed within a reasonable time, and so such exception should be construed. If More and his grantees might for all time neglect to remove such timber, and still hold and own the same, it would practically prevent Powell and his grantees from clearing up and using that part of the farm on which it was standing, and would, in effect, be an exception of all that part of the farm itself, a purpose which clearly is in direct contradiction of the whole conveyance.

It has been frequently held that when the owner of a tract of land has conveyed to another all the timber on such tract, with the right to enter thereon and remove the same, and no time is specified in which to remove it, a reasonable time only is intended, and that the conveyance must be so construed. (28 Am. & Eng. Ency. of Law [2d ed.], 542, and cases cited.)

And that when a definite time is expressed in the conveyance, as for instance ten years, and the grantee does not take it off within such time, the timber remaining shall be considered as belonging to the owner of the land, and the conveyance must be construed as a grant only of so much of the timber which the grantee shall take off within that period. (*Boisubin v. Reed*, 1 Abb. Ct. App. Dec. 161; 2 Keyes, 323; *Kellam v. McKenstry*, 6 Hun, 381; *affd.*, 69 N. Y. 264.)

Construing the exception and reservation contained in the Powell deed by the above rules, we must conclude that More and his grantees acquired thereunder the right to cut and take away so much of the "standing timber" on the south end of the plaintiff's farm as they should cut and take within a reasonable time after such conveyance, and that at the expiration of such time so much thereof as remained became the property of Powell and his grantees.

If, then, More's right to take off such timber did not extend beyond a reasonable time after the Powell deed was given, it is plain that Hiram Conro, his grantee, could not extend such right by any conveyance he could give to the Peckhams, and the arrangement which Isaac Conro testified he made with his father, Hiram, that such timber should all be taken off in four years — and which evidence the referee seems to have believed — seems to be very satisfactory evidence that a reasonable time to remove such timber had passed before Hiram Conro had left the place or conveyed anything whatever to Stephen Peckham. Such deed was given on April 10, 1876, more than sixteen years after the Powell deed, and the timber in question was located on about five acres of land. It would appear that a reasonable time to take off such timber had long expired, and that the above-mentioned conveyance from Conro to Peckham in fact conveyed nothing whatever from the south end of the westerly farm since Conro's rights therein had then fully terminated.

App. Div.]

Third Department, March, 1906.

The defendant, however, claims that even if John Peckham did not acquire the right to take such lumber by a paper title, he acquired title to the wood and timber in question by prescription. John Peckham went into possession of the *easterly* farm in April, 1876, under a conveyance from Hiram Conro, which deed also assumed to convey the right to take the wood and timber from the south end of the *westerly* farm. He resided there for twenty-six years before he conveyed to the defendant, and he testifies that during all that time he took wood and timber from the "reservation," so called, whenever he desired with the knowledge of the owners thereof. Such evidence as to what he and his father did in taking such wood and timber is very indefinite, but it seems clear that such user was not sufficient within the authorities to vest in them title to either the land or the wood and timber thereon. (*Mission of the Immaculate Virgin v. Cronin*, 143 N. Y. 524.)

Nor do I think that such user on the part of More's successor and acquiescence on the part of Powell's successors, as appears from the evidence in this case, has operated as an extension of the reasonable time which More and his successors acquired by the exception and reservation in which to cut and remove the timber in question. Acquiescence on the part of Powell's successors that Conro or the Peckhams take a tree or so each year from the reservation would not bar the owner of the land from insisting that they must cease taking such timber after the time permitted by the exception and reservation had expired, and even though such acquiescence had endured for twenty years, it would not operate as such a bar so long as neither Conro nor the Peckhams claimed any right to take such timber, except through the exception and reservation which More made when he conveyed to Powell. Either one of the owners of such *westerly* farm might consent if he chose to let Peckham take more time than the exception gave, but in case he granted to another such farm without reservation that grantee might insist that Peckham had acquired no rights by such permission other than he took by the paper title through which he claimed. Under such paper title, as shown above, he acquired no rights, and, therefore, in my opinion the plaintiff's judgment was right and should be affirmed.

Judgment unanimously affirmed, with costs.

CHARLES J. PAIGE, as Administrator, etc., of THEODORE J. PAIGE,  
Deceased, Respondent, v. THE NEW YORK CENTRAL AND HUDSON  
RIVER RAILROAD COMPANY, Appellant.

Third Department, March 7, 1906.

**Negligence — infant in arms killed by train while being carried across tracks — no recovery when attendant of infant guilty of contributory negligence — facts showing such contributory negligence.**

There can be no recovery for the death of an infant, nineteen months of age, who while being carried across railroad tracks was struck and killed, when the negligence of the person carrying such infant contributed to the accident.

When it is shown that the person carrying such infant on approaching the crossing looked east and west and saw a train coming from the west on the nearest track, and having crossed that track was struck by another train coming from the east on the next track, down which there was an unobstructed view for 2,400 feet, such person is guilty of contributory negligence as a matter of law, and a recovery for the death of said infant will be reversed.

APPEAL by the defendant, The New York Central and Hudson River Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Schenectady on the 22d day of September, 1905, upon the verdict of a jury for \$1,200, and also from an order entered in said clerk's office on the 19th day of September, 1905, denying the defendant's motion for a new trial made upon the minutes.

The action is brought by the administrator and father of the infant, Theodore J. Paige, to recover for loss occasioned by the death of such infant through the alleged negligence of the defendant railroad company. The death occurred on the 22d day of December, 1902. The infant at that time was nineteen months of age and was then in the care of his grandmother, Theresa Hatch, who was about forty-eight years of age. On that day, at about three o'clock in the afternoon, she, with the deceased in her arms, attempted to cross from the northerly to the southerly side of the defending railroad company's tracks at a crossing where Congress street intersects such tracks in the city of Schenectady. There was at that time a freight train coming from the west on track 4, which was the one nearest to her. It was a dark, wet, muggy day, and the wind was blowing from the west. As she approached the tracks, she stopped and looked to the east and to the west, the train

on track 4 being then, as the plaintiff claims, about 400 feet west of the crossing. She then proceeded across track 4, and was just about to step on track 3 when she was struck by a freight train coming from the east on that track, and both she and the infant were killed. It is claimed that no whistle was blown on the train which struck her as it approached the crossing, nor when it passed the whistling post, which was about 1,000 feet east thereof. There is also evidence that no bell was rung as the train approached the crossing, although the engineer testified that the bell at that time was ringing automatically. The train which struck the deceased consisted of a heavy freight train going down grade at the rate of about eighteen miles an hour. The freight train on track 4 was going east at the rate of about four miles an hour. An action was brought by the administrator of Theresa Hatch, the grandmother of the infant, against the said defendant, for negligently causing her death, which was tried before Mr. Justice JOHN M. KELLOGG and a jury, and resulted in a verdict for the plaintiff. The defendant moved upon the minutes of the court for a new trial, which was granted. The plaintiff appealed from such order to this court, which on January 3, 1905, affirmed the same, but without any opinion (*Hatch v. N. Y. C. & H. R. R. R. Co.*, 101 App. Div. 611, affg. 42 Misc. Rep. 152). Upon the trial of this action the jury rendered a verdict in favor of the plaintiff for \$1,200, and from the judgment entered thereon, and from an order denying a motion for a new trial thereof, this appeal is taken. Further facts appear in the opinion of the court.

*S. W. Jackson*, for the appellant.

*John D. Miller*, for the respondent.

PARKER, P. J.:

It may be conceded in this case that the negligence of the defendant is established, and yet the serious question remains whether the negligence of the grandmother, Theresa Hatch, was not a contributing cause of her own death and that of the infant in question. If it was, as was charged by the trial judge in this case, this action for the death of his intestate cannot be maintained by this plaintiff.

It appears from the evidence that at the place where she stopped to look for an approaching train, viz., from four to six feet north of the first rail of track No. 4, Mrs. Hatch could see a train approaching from the east on track No. 3 a distance of about 2,400 feet; she could from that point also see a train coming from the west on track No. 4 a distance of from 1,200 to 1,400 feet. It seems, then, that when she stopped to make that observation she was not prevented from seeing by any artificial obstruction; undoubtedly if she looked carefully she would have seen both trains. It is suggested that smoke from the train coming from the *west* obstructed her view and confused her action, but I do not discover any satisfactory evidence in this case that any such smoke did in fact so interfere with her. The clear weight of evidence is, that the engine from the west was much too far away when the deceased was hit to permit its smoke to have any such effect. As soon as she has taken this observation she starts to cross the tracks. She goes safely across track No. 4 and into the space of about seven feet between such track and the north rail of track No. 3; then when the engine of the train coming from the east was about ten feet from her, she attempts to step onto such north rail. She is hit by the buffer or beam of such engine, thrown ahead between the rails of the two tracks Nos. 3 and 4, and both she and the infant in her arms are killed.

A mere statement of these facts demonstrates very clearly that the negligence of Mrs. Hatch contributed to her own and the infant's death. We must believe that when she looked east she saw a train coming upon track No. 3. It could not then have been very far off, clearly not so far but that it was in plain sight, and no reason appears why she did not see it. And it would seem that from that moment she started to cross both of such tracks ahead of both the coming trains, and was so intent in getting ahead of the one coming from the east that she never stopped to see how near it had got to the crossing. She misjudged her time, did not take time to give a second look, and, hence, stepped in front of the engine when it was in plain sight and almost within reach of her.

When the appeal in the action against this same defendant for the death of Mrs. Hatch was before this court, we sustained the order of the trial judge, which granted a new trial upon his minutes,



App. Div.]

Third Department, March, 1906.

on the ground that the verdict was against the weight of the evidence. The facts as they appear in this record are not substantially different from those that we then acted upon. We are still of the opinion that Mrs. Hatch's own negligence was the cause of this accident.

This judgment must be reversed on the law and the facts, and a new trial granted, with costs to the appellant to abide the event.

All concurred.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

---

ANNA FREEMONT, as Administratrix, etc., of JOSEPH FREEMONT, Deceased, Respondent, v. BOSTON AND MAINE RAILROAD COMPANY and the DELAWARE AND HUDSON COMPANY, Appellants.

Third Department, March 7, 1906.

**Negligence — death of brakeman while coupling defective cars — failure of defendant to promulgate proper rules — recovery by plaintiff sustained — evidence — opinion of expert as to rule properly received — Employers' Liability Act — assumed risk question of fact — extra allowance denied.**

The plaintiff, a brakeman in the employ of the defendant, while coupling a defective car in the yard of the defendant by means of "a chain hitch," was injured so severely that he died. Evidence was offered of a method in actual use by other railroads in coupling such defective cars, which was not promulgated as a rule by the defendant, but which would have been a reasonable and practicable rule for conducting the work at which the deceased was engaged.

*Held*, that the jury were warranted in finding the defendant negligent in not providing such rule;

That the fact that the tracks on which the decedent was at work had switches at both ends, while those on which the plaintiff's expert witness had worked did not, rendered both the danger and the need of a strict rule the greater.

When said expert in answer to a question as to whether the rule was practicable for use in a freight yard has answered, "I suppose it would be a practicable rule," it is not error to refuse to strike out such answer, for the witness was testifying to his opinion, which was competent.

That the case was not extraordinary or difficult within the meaning of section 358 of the Code of Civil Procedure, and that an order granting an extra allowance should be reversed.

APPEAL by the defendants, the Boston and Maine Railroad Company and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Rensselaer on the 13th day of May, 1905, upon the verdict of a jury for \$5,000; also from an order entered in said clerk's office on the 17th day of May, 1905, denying the defendants' motion for a new trial made upon the minutes, and also from an order entered on the 17th day of May, 1905, granting the plaintiff's motion for an extra allowance.

The defending railroad companies jointly own and operate a freight yard at Mechanicville. On the west side are some twelve tracks, known as the Boston and Maine tracks, and on the east side are about eighteen tracks, known as the Delaware and Hudson tracks. Plaintiff's intestate, Freemont, had been employed by the defendants in said yard as a brakeman for about six months prior to November 10, 1904, upon which date he received injuries from which he died on November eighteenth. The accident causing such injuries occurred on track No. 8 of the Boston and Maine tracks. Track No. 8 was used to temporarily store cars awaiting final assignment to a fast freight then in process of being made up. One crew at the south end would haul cars from different tracks and shunt them onto track No. 8, while another crew at the north end would haul these same cars to whatever fast freight their destination might be. Between four and five o'clock on the morning of November tenth, Freemont's crew had taken off about fifteen cars from the north end of track No. 8 when they came to a defective car, which could only be removed by means of a chain hitch. Such a coupling must be made by going between the cars and inserting a link of the chain into the drawhead of each of the cars to be coupled and dropping a pin through the link. While engaged in doing that work, cars were shunted upon the south end of said track No. 8, and ran against the one which the deceased was endeavoring to couple with the engine, and he was thereby caught between the car and engine, and received the injuries from which he died. The plaintiff, as administratrix of said deceased, claiming that such death was occasioned by the negligence of the defendants, brought this action to recover for the same. The jury rendered a verdict in her favor in the sum of \$5,000, and from the judgment entered thereon,

App. Div.]

Third Department, March, 1906.

and from an order denying the defendants' motion for a new trial on the minutes, this appeal is taken. A motion was also made by plaintiff for an extra allowance of costs, under section 3253 of the Code of Civil Procedure, which was granted, and from this order the defendants also appeal.

*Lewis E. Carr, Jarvis P. O'Brien and Martin L. Murray*, for the appellants.

*G. B. Wellington*, for the respondent.

PARKER, P. J. :

The trial judge, at the request of the defendants' counsel, *substantially* charged the jury that they were authorized to find the rule suggested by the plaintiff a necessary and proper one for this case, if the proof showed that such rule was in force on some other road, or if it showed that it was practicable and reasonable to provide against such an accident, or if the propriety and necessity of such particular rule was so obvious as to make it a question of common experience and knowledge. Such charge must be deemed to furnish the law of this case, and also seems to be in harmony with the decisions upon that subject. (*Larow v. N. Y., L. E. & W. R. R. Co.*, 61 Hun, 11; *Koszlowski v. American Locomotive Co.*, 96 App. Div. 40, 44; *Berrigan v. N. Y., L. E. & W. R. R. Co.*, 131 N. Y. 582, 585.)

Applying such law to the facts of this case and it seems clear that the jury were authorized to find that there was a reasonable and practicable rule which the defendants could and should have furnished for use in this Mechanicville yard, and that their omission to promulgate such a rule was negligence which contributed to the death of the plaintiff's intestate. Drake, an expert witness sworn on the part of the plaintiff, testified that the rule suggested by the plaintiff's counsel would have been a reasonable and *practicable* one under which to have conducted such work in the yard as the deceased was engaged in when he met his death. He also stated that such work was, in actual practice, conducted by the employees in different yards where he had worked after the method suggested in the rule, although no such rule was actually promulgated by any

of the companies for which they worked, thus indicating that such method was not only a practicable one but was also a reasonable and necessary method. This witness had worked for years in many different yards where similar work was carried on, and for some time as a manager of such yards, and was evidently competent to judge whether the rule which the plaintiff claimed should have been adopted was a reasonable and practicable one for the protection of the men engaged in such work; and if the jury correctly reached the conclusion that such witness was correct in that respect, it was for it to further determine whether the defendants had performed their full duty to the deceased in neglecting to provide any rule whatever upon that subject.

I am of the opinion that, under the proofs in this case, the jury were authorized to find the defendants negligent in not providing such a rule as was suggested on the part of the plaintiff upon the trial of this case.

It is urged by the defendants' counsel that the evidence of the plaintiff's witness Drake does not really furnish the information which I have above claimed for it. From a careful examination of such evidence as it appears on this record, I am satisfied that such is its fair import and meaning; and it must also be borne in mind that no contradiction of such evidence is given, and that no skilled evidence has been offered by the defendants to show wherein such a rule would have been either impracticable, unreasonable or useless.

It is urged, however, that this witness was not competent as an expert because the yards in which he had worked did not have switches connecting at both ends with each other. But the work of going in between the ends of cars and coupling with a link or chain and pin on such switches was usual in the yards and in all essential features the work was the same except, perhaps, the danger was greater and a stringent rule more needed in the yard in question than in one where an entrance could be made at only one end.

It is also urged that error was made on the trial by the judge refusing to strike out on the defendants' motion the answer of such witness. On the trial the plaintiff's counsel put to such witness a supposed rule, and asked him whether it would be a practicable

App. Div.]

Third Department, March, 1906.

rule for use in a freight yard. He answered: "Yes, I suppose it would be a practicable rule, but understood by railroad men." The plaintiff's counsel asked to strike out the latter part of this answer, "but understood by railroad men," as not responsive, and that the rest remain. The court replied: "I strike out all except his answer stating that that would be a practicable rule." By this the court meant that he retained what the plaintiff's counsel asked to have retained, and struck out what he asked to have stricken out. To this the defendants' counsel excepted, and then asked to strike out so much of such answer, viz., "I suppose it would be a practicable rule," on the ground that it is not a statement of fact. This motion was denied and defendants excepted. He strenuously urges that that was reversible error. I think not. The most that was asked from this witness was his opinion. He was testifying as an expert, and hence his opinion was properly received. The trial judge did not "transform a supposition into a fact," but merely treated the phrase used by the witness as an expression of his opinion.

The defendants' counsel further urges that the injury which the deceased received in this case resulted from a risk that was plain and obvious, and hence it was one for which no negligence can be predicated against the defendants.

By section 3 of the Employers' Liability Act (Laws of 1902, chap. 600), under which this action is brought, the question of whether or not the deceased assumed the risk, under circumstances similar to these, is no longer one of law. It must be left to the jury, and the trial judge in this case left that question to this jury. The only question, therefore, left to this court in this connection is whether we should reverse the finding of the jury upon that question. If the risk of the accident which killed the deceased was an obvious one, and was in fact assumed by him, he cannot recover. If it was not assumed by him he is not thereby barred from recovering. I am of the opinion that we should not disturb the verdict upon this point. An analysis of the evidence is not needed in an opinion. Suffice it to say that it is not entirely certain that the deceased had such a knowledge of every detail of the method of carrying on that work, and of the situation under which they were working, as to make the risk obvious to him. The

burden was upon the defendants to prove it, and so I conclude that we should not now disturb it.

I discover no errors that call for a reversal of this judgment. I recommend, therefore, that it be affirmed, with costs.

As to the order granting to the plaintiff an extra allowance of costs, I am of the opinion that it should be reversed. There is nothing extraordinary or unusually difficult in this case — nothing to bring it within the provisions of section 3253 of the Code of Civil Procedure.

Order granting extra allowance reversed. Judgment and order denying motion for new trial modified by striking from the judgment the amount of the extra allowance, and as so modified unanimously affirmed, with costs.

---

WILLIAM J. PARKS, as Administrator De Bonis Non, etc., of ERWIN L. COOLIDGE, Deceased, Respondent, v. THE CITY OF NEW YORK, Appellant, Impleaded with CHARLES A. COWEN and JOSEPH G. MILLER and CHARLES A. HOLME, Doing Business under the Firm Name and Style of J. G. MILLER AND COMPANY, Defendants.

First Department, March 16, 1906.

**Negligence — liability of city for injuries received through collapse of bridge over excavation in sidewalk — notice to police officer is notice to city — city joint tortfeasor with landowner making excavation under municipal permit — action against city not barred by prior recovery against contractor erecting bridge.**

The plaintiff's intestate was killed by the collapse of a temporary bridge erected over an excavation in the sidewalk which was made under a permit from the municipal authorities of the city of New York. In an action against said city to recover damages,

*Held*, that notice to the defendant of the defective condition of the bridge was sufficiently established by the uncontradicted testimony of a police officer that the bridge had been shaky for nearly a month prior to its collapse, and that five or six days prior to the accident he had, on the complaint of a third person, reported the condition of the bridge at the police station orally, and eighteen hours before the accident had made a written report of the condition;

That knowledge of such defect by an officer charged with police powers was knowledge by the municipality irrespective of any report thereof by such officer;

App. Div.]

First Department, March, 1906.

That when an inspector appointed by the building department of said city has inspected such bridge the city is chargeable with actual notice that the bridge was defective by reason of the absence of braces.

*Held*, further, that a municipality which issues a permit to a landowner to make such excavation in a sidewalk and to erect a temporary bridge thereover, is a joint actor with the owner of the land and is responsible for his default, for a city is bound to see that its streets and sidewalks are kept reasonably safe for public travel;

That an entry of a prior judgment still unsatisfied against the contractors who built the bridge was not an election to hold them alone responsible or an abandonment of the cause of action against the city. A plaintiff may sue joint tort feorsors jointly or separately, but the satisfaction of a judgment against one is a satisfaction against all;

That, although a prior judgment against the contractor and the city jointly had been reversed as to the city, and a new trial granted, the fact that the plaintiff retained his judgment against the contractors did not bar a subsequent action against the city.

CLARKE, J., dissented.

APPEAL by the defendant, The City of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 29th day of July, 1905, upon the verdict of a jury for \$25,000, reduced by stipulation to \$15,000, and also from an order entered in said clerk's office on the 23d day of June, 1905, denying the said defendant's motion for a new trial made upon the minutes.

*Theodore Connolly*, for the appellant.

*Joseph H. Choate* [*William B. Waring* of counsel], for the respondent.

McLAUGHLIN, J.:

There have been two trials of this action. On the first the plaintiff had a verdict against the city of New York and the defendants Miller and Holme for \$22,000, but on appeal the judgment was reversed as to the city and a new trial ordered, and also reversed as to Miller and Holme unless the plaintiff stipulated to reduce the verdict to \$15,000, in which case the judgment was affirmed. (*Coolidge v. City of New York*, 99 App. Div. 175.) The stipulation was made and the verdict accordingly reduced against Miller and Holme to \$15,000, upon which judgment was entered. The second trial was against the city alone and resulted in a verdict against it for \$25,000, which, upon motion of the defendant, was reduced to

\$15,000, and from the judgment entered for that amount, as well as from an order denying a motion for a new trial, the city appeals.

The evidence on the second was substantially the same as that offered upon the first trial, except that additional evidence was given tending to establish that the city had actual notice of the defective condition of the sidewalk before the accident occurred. The facts relating to the accident, the construction of the bridge or temporary sidewalk, its weakness and final collapse, are fully set out in the opinion delivered on the former appeal, and, therefore, it is unnecessary to restate them or refer to any but the additional bearing on those subjects. On that appeal this court held, Mr. Justice INGRAHAM writing the opinion, that there was "evidence from which the jury could find that the braces to make such a structure safe were omitted, and that it was the absence of those braces that caused the structure to fall." The reversal of the judgment, so far as the city was concerned, was upon the ground that it did not have sufficient notice of this defect. It then appeared that the city did not have actual notice of the defective condition of the bridge until the morning of the day the accident occurred, and this was held to be insufficient to charge the city with a failure to take precautions to strengthen the bridge. On the trial which resulted in the judgment now appealed from, it appeared that the city had actual notice of the defects several days before the accident occurred. The witness Baxter, a policeman stationed in that locality at and immediately prior to the accident, who was not a witness on the first trial, testified in substance that the bridge from the time it was constructed, which was nearly a month before the accident, was shaky and vibrated when walked upon; that five or six days prior to the accident one Hess called his attention to its unsafe condition, and advised him to report it to the station house, and at the same time said if he did not make such report he would do so himself. And he is corroborated by the witness Hess, who testified that he called Baxter's attention to the unsafe condition of the bridge in case a parade should pass there. Baxter further testified that after his attention had been called to the bridge by Hess, he did, several days before the accident, make an oral report at the station house to the captain in charge that the bridge was unsafe in case a parade passed there. He also testified that he made a written report on



App. Div.]

First Department, March, 1906.

the day of the accident and about eighteen hours before it occurred. This report was made at twelve-twenty A. M., and the accident occurred about six P. M.

The testimony was uncontradicted. It is severely criticised by appellant's counsel, but its credibility was for the jury, and if believed by them, was sufficient to justify a finding that the city had actual notice in time to remedy the defect, and this irrespective of whether or not Baxter made his oral report. Notice to Baxter — a police officer — was notice to the city. (*Rehberg v. Mayor, etc., of City of New York*, 91 N. Y. 137.) Notice to any officer charged with police powers, irrespective of his rank or grade, is notice to the city. (*Johnson v. City of Poughkeepsie*, 29 App. Div. 16.)

Not only this, but the city had actual notice of the defects from the time the bridge was built until it collapsed. The witness Hamel, an inspector, saw it on several occasions. He was the officer detailed by the defendant's building department to, and he actually did make several inspections. This was actual notice to the city that the bridge was defective by reason of the absence of the braces referred to. Another fact appearing upon the second, which did not appear upon the first trial, was that the defendant had workmen ready to respond immediately to the call of the police in case of emergency, to remedy defects in structures of this character, and it was a question for the jury, in view of this fact, whether the city performed its full duty in not resorting to this means of strengthening the bridge after the actual notice was given by Baxter on the morning of the day of the accident.

I do not think it can be said that this verdict is against the weight of evidence, either as to the defective condition of the bridge or as to the city's having actual notice a sufficient time prior to the accident to have enabled it to have remedied the defects. But irrespective of any notice the city was liable inasmuch as the jury found the bridge was defective and its verdict was based upon evidence which fairly sustains the same. The law imposes upon a municipality the duty of seeing that its streets and sidewalks are kept reasonably safe for public travel. Here the city issued a permit to the owner of the land abutting upon the street to excavate beneath the sidewalk, which necessitated the removal of the sidewalk itself and the erection of a temporary bridge in place thereof.

Having issued this permit there was an absolute duty imposed upon the city to see to it that the portion of the street interfered with by reason of the permit was kept reasonably safe or that a person using it was seasonably warned that he could not rely upon the presumption that it was safe for use. The city, by issuing the permit, became a joint actor with the owner of the land in the erection of the bridge and by reason thereof became responsible for any neglect or fault of the owner in properly erecting the bridge. The principle is precisely the same as if an obstruction had, under a permit, been placed in the street. In *Cohen v. Mayor, etc., of New York* (113 N. Y. 532) the injury was caused by a wagon which had been placed in a public street, under a permit granted by the city, and it was held that under such circumstances the city was liable "the same as if it had itself maintained the nuisance, for the owner of the wagon was nothing more than an agent through whom the defendant did this unlawful act." In *Speir v. City of Brooklyn* (139 N. Y. 6) the plaintiff was injured by the discharge of fireworks in a public street, and it was held that if the city directed or authorized the discharge of the fireworks which caused the injury complained of, it was liable; that the mayor had, by permit, authorized the fireworks to be discharged in the street under the provisions of an ordinance which gave him authority to grant such permit, and, therefore, the city was liable.

A similar question was before the court in the recent case of *Landau v. City of New York* (180 N. Y. 48), where the same rule was applied. And in *Godfrey v. City of New York* (104 App. Div. 357), where a pile of stones had been deposited in the street the day previous to the accident, it was held that even though the lapse of time was not sufficient to justify a finding that the city had actual notice of that fact, nevertheless it was negligent in not knowing the condition of the street and removing the obstruction, inasmuch as the stones were piled there under a permit issued by the city. Mr. Justice INGRAHAM, delivering the opinion of the court, after citing numerous cases, said: "These cases establish a proposition that where a municipal corporation gives a permit to obstruct a street an absolute duty is imposed upon the corporation to see to it that the obstruction is so protected and guarded that a person using the street and entitled to rely upon the presumption that it is

App. Div.]

First Department, March, 1906.

safe for use, will be warned of the danger in time to avoid injury. By giving the permit it thereby becomes a joint actor with the licensee in creating the obstruction and the city thereby becomes responsible for any neglect or default of the licensee in properly guarding, so that persons using the street will not be exposed to unnecessary danger."

Finally, it is urged that the judgment should be reversed because the plaintiff, by the entry of the judgment against Miller & Holme, elected to proceed against them alone and thereby abandoned his cause of action against the city. I do not understand this to be the law. A plaintiff may sue all joint tort feors jointly or each of them separately. If he brings separate actions and has separate recoveries, the satisfaction of one judgment satisfies them all. (*Livingston v. Bishop*, 1 Johns. 290; *Thomas v. Rumsey*, 6 id. 26; *Breslin v. Peck*, 38 Hun, 623; *Russell v. McCall*, 141 N. Y. 437; *Palmer v. N. Y. News Publishing Co.*, 31 App. Div. 212.) Here, the plaintiff elected to proceed against the city and Miller & Holme jointly, and the first trial, as we have already seen, resulted in a judgment against them jointly. The fact that that judgment was reversed as to the city and a new trial ordered did not, because the plaintiff saw fit to reduce the judgment as to Miller & Holme instead of taking a new trial, destroy his cause his action against the city. He could still retain the judgment against Miller & Holme and continue the action, as he did, against the city. A satisfaction of either judgment, however, would be a satisfaction of both. Other errors are suggested but they do not seem to require consideration here.

The judgment and order appealed from, therefore, should be affirmed, with costs.

O'BRIEN, P. J., concurred; INGRAHAM and HOUGHTON, JJ., concurred in result; CLARKE, J., dissented.

Judgment and order affirmed, with costs.

EDWARD A. LAYTON, Appellant, v. ELIZABETH H. KRAFT and Others, Respondents.

First Department, March 16, 1906.

**Evidence — pedigree may be proved by hearsay — rules as to the admission of oral and written declarations on questions of pedigree stated.**

Pedigree is the history of family descent which is transmitted from one generation to another by both oral and written declarations, and unless proved by hearsay evidence not competent in general issues, it cannot, in most instances, be proved at all. Matters of pedigree consist of descent and relationship evidenced by the declarations as to particular facts such as births, marriages and deaths. In such cases hearsay evidence of declarations to persons, who from their situation were likely to know the facts, is admissible when the person making the declaration is dead.

But before these declarations can be received in evidence it must appear that the person making them was a member of the family whose descent is sought to be traced. Only slight proof of relationship will be required, since the relationship of the declarant with the family might be as difficult to prove as the very fact in controversy.

In tracing pedigree identity of name raises a presumption of identity of person where there is similarity of residence or trade, or circumstances, or where the name is an unusual one, and such identity of name being shown, the burden is upon the party denying the identity to show that the name relates to a different person.

Hence, in an action for partition where the plaintiff is seeking to show his relationship to a deceased owner of the property, and declarations, made by members of the family with whom relationship is sought to be proved, are offered in evidence, it is error to exclude evidence of marriages, deaths and burials of persons alleged to have been the plaintiff's ancestors, as shown by church records entered in books kept for that purpose.

Such proof should not be excluded merely because the handwriting of the person who made the entries is not proved, or because they were made by the clerk of the church and not by the pastor himself, if such records are ancient documents.

As a general rule an ancient record or document which comes from a custody which the court deems proper, and is itself free from any indication of fraud or invalidity, proves itself.

It is also immaterial that names appearing in said records were spelled in different ways.

**APPEAL** by the plaintiff, Edward A. Layton, from a judgment of the Supreme Court in favor of the defendants, entered in the office

App. Div.]

First Department, March, 1906.

of the clerk of the county of New York on the 6th day of July, 1905, upon the decision of the court, rendered at the New York Special Term, dismissing the complaint, certain questions of fact having been submitted to a jury at the New York Trial Term, and a verdict in favor of the defendants having been rendered by direction of the court, and also from an order entered in said clerk's office on the 9th day of June, 1905, denying the plaintiff's motion for a new trial made upon the minutes.

*Rastus S. Ransom*, for the appellant.

*Morris A. Tyng*, for the respondents.

HOUGHTON, J. :

Although Anna E. St. John left a will, it is conceded that she died intestate as to the real property described in the complaint. The action is in partition, the plaintiff alleging that he and his sister, the defendant Kraft, are the only heirs at law of the deceased. The relationship claimed is, that the plaintiff's grandmother was a sister of the mother of the deceased. The grandmother's name was Maria Hyer, and she married Alexander Tulloch, and plaintiff asserts that the mother of the deceased was Hannah Eliza Hyer, who married Francis Bos, and that both were children of Daniel Hyer, who married Catherine Bokee.

The plaintiff was sworn as a witness in his own behalf, and testified that he was born in 1845, and that his mother, Jane E., who had married his father, Edward C. Layton, died when he was fifteen years of age ; that his grandmother, Maria Tulloch, died when he was seventeen years of age, and that his great-grandmother, Catherine Hyer, died when he was twenty-four years of age, and that during his boyhood they all constituted one family. Both the grandmother and the great-grandmother were then widows, the grandfather, Alexander Tulloch, and the great-grandfather, Daniel Hyer, having died before plaintiff was born. As a boy plaintiff knew Anna E. St. John when her former husband, Charles E. Burton, was living, and he testified that she visited his grandmother and great-grandmother, and was known as their niece. These facts were practically all the personal knowledge that the plaintiff had with respect to the identity of his ancestors. That his grand-

mother was married to Alexander Tulloch, and that her maiden name was Maria Hyer; and that his great-grandmother was married to Daniel Hyer, and that her maiden name was Catherine Bokee, and that the name of one of his great-grandmother's children was Hannah Eliza, and that she married Francis Bos, and that their only child was the deceased, and that the other descendants of Daniel Hyer and his wife Catherine died in infancy or without issue, he learned only by the various declarations of his ancestors, which were, of course, hearsay. All of the family lived in Brooklyn, and the plaintiff was born there.

In order to meet the rule requiring it to appear that the persons making the declarations were members of the family whose relationship was sought to be proved, and to show that the deceased, Anna E. St. John, was a member of that family, plaintiff produced the witness Emma L. J. Schoonmaker, who testified that she knew Mrs. St. John, and lived in her father's family; that her father's name was Francis Bos; that she had heard Mrs. St. John speak of her mother's mother, "grandmother Hyer," who was dead, and of her uncles and aunts on her mother's side, the Tullochs and their children, the Laytons, or Claytons, as the witness understood the name, and had heard her say that her mother died in her own infancy.

To further meet the rule as to the declarations the plaintiff offered in evidence certain letters and receipts addressed to and held by the Tulloch and Layton families, and inscriptions on tombstones, and also the record of baptisms of the Collegiate Reformed Church of the city of New York, showing that Maria, a child of Daniel Heyer and Catherine Bokee was born February 7 and baptized February 28, 1798, and that Hannah Eliza, a child of Daniel Heyer and Catherine Bohea, was born September 13 and baptized October 19, 1801, and that other children of Daniel Heyer, or Hyer, and Catherine Bokee, or Bohea, or Bookee, or Bockee, were baptized at various times in the years 1807 and 1809, and that Alexander, a child of Alexander Trulloch and Maria Hyer, was born December 2 and baptized December 15, 1819.

There was also offered in evidence the record of marriages of said church, showing that on March 10, 1819, Alexander Tulloch and Maria Heyer were married, and that on May 24, 1823, Francis Bos and Hannah Hyer were married, and the register of deaths and

App. Div.]

First Department, March, 1906.

burials of said church showing that Hannah E. Boss was buried January 25, 1825.

The Collegiate Reformed Church, first established on Manhattan island in 1628, is a corporation and has several congregations. The records of marriages and births are furnished by the various pastors of the congregations to the clerk of the corporation, and the record is made by him in books kept for that purpose.

There was no proof as to the handwriting of any of the entries offered in evidence or as to who was clerk of the church corporation at the time they were made, but they were produced as the records of the church by its clerk to whom they came from his predecessor in office. The trial court held that there was not sufficient proof of authenticity of these records to entitle them to be received in evidence. The court also held that without them there was no independent proof that plaintiff's ancestors were members of the family of Anna E. St. John, the deceased, sufficient to entitle declarations of deceased persons to be given in evidence, and on motion struck them from the case and directed the jury upon the framed issues to find a verdict against the plaintiff.

We think the court erred in not receiving the records offered in evidence.

The issue presented was one of pedigree simply. Pedigree is the history of family descent which is transmitted from one generation to another by both oral and written declarations, and unless proved by hearsay evidence not competent in general issues it cannot, in most instances, be proved at all. Matters of pedigree consist of descent and relationship evidenced by declarations of particular facts such as births, marriages and deaths. In such cases hearsay evidence of declarations of persons who from their situation were likely to know, is admissible when the person making the declarations is dead. Before these declarations can be received in evidence, however, it must appear that the person making them was a member of the family whose descent is sought to be traced. Only slight proof of the relationship will be required, since the relationship of the declarant with the family might be as difficult to prove as the very fact in controversy. (*Young v. Shulenberg*, 165 N. Y. 388; *Eisenlord v. Clum*, 126 id. 563; *Fulkerson v. Holmes*, 117 U. S. 397.) Cases of pedigree are peculiar in that they depend almost exclu-

sively upon presumption, which is a process of probable reasoning from facts established or judicially noticed, and the weight to be given this character of evidence depends upon the facts surrounding each particular case. Identity of name raises a presumption of identity of person where there is similarity of residence, or trade, or circumstances, or where the name is an unusual one. (Lawson Presump. Ev. [2d ed.] rule 57, p. 307.) Identity of name is *prima facie* evidence of identity of person. (*Young v. Shulenberg, supra*; *Stebbins v. Duncan*, 108 U. S. 32, 47; *People v. Snyder*, 41 N. Y. 397, 403; *Hatcher v. Rocheleau*, 18 id. 86; *Mahaney v. Mutual Reserve Assn.*, 69 Hun, 12, 16; *Trebilcock v. McAlpine*, 46 id. 469, 473; *Spotten v. Keeler*, 22 Abb. N. C. 105.) In a case of identity of name, the presumption arises from the improbability that different persons have the same name, and, therefore, the onus is cast upon the party denying the identity to show that the name relates to a different person. (*People ex rel. Haines v. Smith*, 45 N. Y. 772, 779.) Mere misspelling of a name, where there is not such difference as to make it a distinct name, does not affect the identity of the person. (*Jackson v. Boneham*, 15 Johns. 226; *Jackson v. Cody*, 9 Cow. 140, 147.) From the nature of the case a question of pedigree forms an exception to the general rule as to the proof of a particular fact by hearsay, reputation or tradition; and, in addition to the declarations of deceased persons who were likely to know, unauthenticated facts and entries, made presumably with no motive to deceive, such as an entry in a family bible, an inscription on a tombstone, a pedigree hung up in a family mansion, and recitals in deeds, are competent evidence upon that issue. (*Jackson v. Cooley*, 8 Johns. 128, 131; *Young v. Shulenberg, supra*.)

Notwithstanding the fact that proof of handwriting was not made, and that there was no evidence that the entries were in the handwriting of one who was then clerk of the Collegiate Reformed Church of the city of New York, or that there was a rule of the church requiring such records to be kept, we think the records of marriages and baptisms and deaths kept by that church were competent evidence and should have been received upon the trial.

These same records were received in evidence and held proper



App. Div.]

First Department, March, 1906.

in *Jackson v. King* (5 Cow. 237), and were there considered of such a public nature that an exemplified copy might be used.

In *Jacobi v. Order of Germania* (73 Hun, 602) and in *Hartshorn v. Metropolitan Life Ins. Co.* (55 App. Div. 471) records of baptism kept by the pastor of a church were held competent for the purpose of showing, not when the person was born, but when he was baptized, which must have been after his birth.

These authorities are said not to be applicable to the present question, because it was there shown that the records were kept by the pastors of the churches, and in the present case the record was kept only by the clerk. Nevertheless they are records of the church, and in its custody, preserved by it, and presumably made by some one in authority. The church, as a corporation, had several congregations in charge of different pastors. Each pastor might have kept a record of such marriage ceremonies as he performed, and such baptismal services as he held. If this had been done, doubtless no question would have been made as to the competency of the record. We are of the opinion that that competency, with respect to pedigree, was not destroyed by the fact that one general record was kept by the clerk of the church corporation, of the acts of this character of the several pastors of the various congregations. There is no reason to doubt the truthfulness of the records or to assume that they were made from any improper motive.

Besides, they were ancient documents, and had been in existence for a century. They came from a custody which must be deemed proper and they proved themselves. The general rule is, that an ancient record or document, if it comes from a custody which the court deems proper, and is itself free from any indication of fraud or invalidity, proves itself. (*Matter of Webster*, 106 App. Div. 360.) Had the records been received in evidence they would have tended to show that Anna E. St. John was a member of the family of plaintiff's grandmother and great-grandmother, who were dead, and the declarations of these persons as to the relationship of Anna and her mother to the plaintiff's grandmother would have been proper, as well as their declarations as to the decease of other members of the family, without issue.

If the view that these records should have been received in evidence is correct, inasmuch as a new trial must be had, it is unneces-

sary to pass upon the question whether or not the plaintiff produced other evidence sufficient to render these declarations competent, for the records can then be introduced, and they will themselves furnish *prima facie* proof of common ancestry, sufficient to make these declarations admissible.

Little significance, it seems to us, should be attached to the fact that Catherine Bokee's name is spelled in different ways. Daniel Hyer or Heyer is the father mentioned throughout the record and Catherine is the mother named. That a mistake was made with respect to her maiden name, of course, raises a question of fact as to whether or not she is the same person, but not so serious a one as to prevent the introduction of the record in evidence.

Our conclusion is that the judgment and order should be reversed, and a new trial granted, with costs to the appellant to abide the event.

O'BRIEN, P. J., PATTERSON, McLAUGHLIN and LAUGHLIN, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event. Order filed.

---

LAWRENCE BROTHERS, INCORPORATED, Respondent, v. HENRY B. HEYLMAN, Defendant, Impleaded with HARRIET A. HEYLMAN, Appellant.

First Department, March 16, 1906.

Creditor's bill to set aside conveyance — evidence — when deposition of grantor on supplementary proceedings casts burden on grantee to disprove fraud — failure to object to such deposition as hearsay — evidence of value of lands — in creditor's action court may set aside deed or declare it to be a mortgage.

When in a creditor's suit to set aside a conveyance as in fraud of creditors, or in the alternative to have it adjudged to be a mortgage, the deposition of the grantor taken in supplementary proceedings, showing that the consideration was grossly inadequate, has been introduced in evidence, without proper objection on the part of the grantee, the burden is cast upon a grantee, related to the grantor, by such proof of inadequacy of price, to rebut the presumption of fraud raised by such evidence and to show that she was a purchaser in good faith for a valuable consideration.

App. Div.]

First Department, March, 1906.

When the only objection of the grantee to the introduction of such deposition was that it was not properly authenticated, which objection was not well taken, and when she later introduced the deposition in her own behalf, she cannot subsequently object that it was hearsay as against her.

Moreover, such deposition casting the burden upon the grantee to disprove fraud cannot be said to lack probative force against her.

It is not error to admit evidence of the compensation paid for one-half of the lands which were taken upon condemnation proceedings when the price proved shows that the consideration in the deed was grossly inadequate.

In such action the court is not bound either to let the deed stand or set it aside absolutely. It may declare it to be a mortgage, and the grantee cannot complain of such latter decree, which is more favorable to her.

INGRAHAM and McLAUGHLIN, JJ., dissented, with opinion.

APPEAL by the defendant, Harriet A. Heylman, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 9th day of June, 1905, upon the decision of the court rendered after a trial at the New York Special Term.

*Richard Krause*, for the appellant.

*Ralph Earl Prime, Jr.*, for the respondent.

HOUGHTON, J.:

The plaintiff is a judgment creditor of defendant Henry B. Heylman, and brings this action after return of execution to set aside a conveyance of real property made by him to his mother, appellant Harriet A. Heylman, or in the alternative to have the deed from him to her declared to be a mortgage only.

While plaintiff's original action was pending against him, and shortly before entry of judgment thereon, defendant Henry conveyed to appellant Harriet, who resided with him, real property which the trial court found to be of the value of \$40,000, upon which there were incumbrances, including back taxes and mechanics' liens amounting to \$8,420.46, and which constituted all the property, real or personal, that he owned subject to execution, for the expressed consideration of \$4,000, the deed not being recorded until some months after its date.

Defendant Henry answered but did not appear upon the trial. Appellant Harriet appeared, but was not sworn and produced no

witnesses. On the trial the plaintiff read the testimony of Henry given upon supplementary proceedings, and gave the substance of his testimony in another action, in both of which he detailed the transaction which resulted in his conveyance to his mother, and from which it appeared that no present consideration passed at the execution of the deed, but that it was given for a past indebtedness claimed to be at least \$5,000, which his mother had frequently importuned him to pay.

Proof of the value of the premises was made by showing that the city had taken about one-half for the purpose of widening an avenue, and made an award of \$22,597 therefor, shortly after the conveyance.

Independent proof was made that Henry, a lawyer, acted as agent for his mother in certain matters including the premises in question. The trial court found that the transfer was for a grossly inadequate consideration, and although absolute in form was not intended to be an absolute conveyance, but only as security for whatever indebtedness might be owing from Henry to appellant, and that the value of the premises above the incumbrances was greatly in excess of such indebtedness, and that as to such excess the conveyance was made with intent to hinder, delay and defraud the plaintiff.

From the judgment in conformity with this finding Harriet appeals, alleging that there is no proof that she was a party to any fraud, or that the conveyance was not intended to be an absolute one, or that any case was made against her which called for explanation on her part.

We think the plaintiff made a *prima facie* case of fraud against the grantor, Henry. His declarations were, of course, competent against himself. Courts will scrutinize with care business transactions between parent and child. (*First Nat. Bank v. Miller*, 163 N. Y. 167.) Inadequacy of price, when great, is a badge of fraud. (*Sandman v. Seaman*, 84 Hun, 337; *affd.*, 156 N. Y. 668; *Briggs v. Mitchell*, 60 Barb. 288.) A voluntary conveyance by one indebted at the time is presumptively fraudulent. (*Smith v. Reid*, 134 N. Y. 569.) Fraud, as well as the fact of notice or knowledge, need not be established by direct evidence, but may be inferred from circumstances. (*Parker v. Conner*, 93 N. Y. 119.) One is presumed

App. Div.]

First Department, March, 1906.

to have intended the natural and inevitable consequences of his acts, and when those acts point to an intent to defraud creditors, it is the duty of the court to find in accordance with the presumption. (*Coleman v. Burr*, 93 N. Y. 17, 31; *Smith v. Reid*, *supra*, 576.)

The plaintiff having made a *prima facie* case of fraudulent intent on the part of appellant's grantor, it was incumbent upon her, in order to relieve herself from the presumption of fraud on her part, to prove that she was a purchaser in good faith for a valuable consideration. Where a deed is executed with intent on the part of the grantor to defraud his creditors, a presumption arises that such intent was shared by the grantee, and it is incumbent upon the grantee to show that she was not only a purchaser for value and in good faith, but that she had no knowledge of facts which put her upon inquiry as to the grantor's intent. (*Gilmour v. Colcord*, 96 App. Div. 358; *Bailey v. Fransioli*, 101 id. 140.)

The appellant makes no point upon the argument that the declarations of her grantor were improperly received even as against herself, nor could she well do so in view of the character of the objection which she made to the reception of such evidence. The objection was not on the ground that the declarations were hearsay as against her, but only upon the ground that they were incompetent because not properly sworn to or authenticated. This objection was not well taken, and she not only neglected to raise the point that they were hearsay as against her, but she afterwards introduced in her own behalf all this evidence which she had previously objected to. It is said, however, that even if the declarations are properly in the case they have no probative force as against her. If they proved fraud on the part of the grantor, as we think they legitimately did, and if the burden of explanation was thereby cast upon her, it is of no moment whether they are of probative force against her or not.

Nor do we think there was any error in the proof as to the value of the premises. Even if it cannot be inferred that the other half of the premises not taken in the condemnation proceedings were as valuable as the half which was taken, still there was a gross inadequacy of consideration even if the \$4,000 mentioned in the deed was actually due the appellant.

It is also urged that the court could not declare the conveyance to be a mortgage, but must set it aside absolutely or let it stand as a

valid conveyance. "It is an established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage when it is executed as security for a loan of money. That court looks beyond the terms of the instrument to the real transaction.'" (*Mooney v. Byrne*, 163 N. Y. 86, 92.) The court might have set aside the deed entirely. That it gave to the appellant a judgment more favorable than she was entitled to is not a cause of complaint on her part. Where one party submits to a judgment the other cannot be heard to insist that it shall be set aside because it is unjust to the one recovering it. (*Rockefeller v. Lamora*, 106 App. Div. 345.)

Our conclusion is that the evidence was sufficient to sustain the findings of the court, and that the judgment must be affirmed, with costs.

O'BRIEN, P. J., and CLARKE, J., concurred; INGRAHAM and McLAUGHLIN, JJ., dissented.

INGRAHAM, J. (dissenting):

I do not think that the deposition of the defendant Henry B. Heylman was competent evidence against the appellant, or that such deposition, which was admissible merely as declarations of the defendant Henry B. Heylman, was sufficient to sustain a recovery against the appellant. Such declarations were admissible as evidence, as Henry B. Heylman had interposed an answer, and while evidence against him, were incompetent against the appellant, and their admission did not tend to prove any fact which the plaintiff was bound to establish as against the appellant. As these declarations of Henry B. Heylman were the only evidence to sustain the plaintiff's cause of action, I think, as against this appellant, the complaint should have been dismissed. I therefore, dissent.

McLAUGHLIN, J., concurred.

Judgment affirmed, with costs. Order filed.

App. Div.]

First Department, March, 1906.

CHARLES H. BLAIR, as Trustee of the Estate of DAVID CARGILL, Deceased, Appellant, Respondent, v. ANDREW H. CARGILL and Others, Respondents, Impleaded with PANOLA C. HAMPTON and KATE M. STEARNS, Respondents, Appellants.

First Department, March 16, 1906.

**Trust — when beneficiaries consenting to unauthorized loan by trustee not personally liable to cobeneficiaries — waiver of objections to and ratification of such loan by cobeneficiaries — when foreign judgment that note has outlawed is binding here — extra allowance denied to beneficiaries, but allowed to accounting trustee.**

Mere knowledge and consent by a beneficiary to an unauthorized loan made by a trustee in the absence of fraud or collusion, or the receipt by the beneficiary of any of the money, is not sufficient to make such beneficiary liable to reimburse his cobeneficiaries for any loss that may occur.

Hence, beneficiaries of a trust estate who have indorsed notes given to secure the payment of an unauthorized loan, in the absence of fraud or collusion, or a receipt by the indorsers of portions of the money loaned, are not personally liable to their cobeneficiaries for such unauthorized loan except on their indorsement.

Moreover, when, after such unauthorized loan, the other beneficiaries, with knowledge, have ratified the accounts of the trustee after his decease, they have waived any objection which they might have made that the loan was unauthorized by law.

So, too, said cobeneficiaries by failing to appear and object to the unauthorized loan after the service of due notice of an application to discharge the retiring trustee are deemed to have assented to said loan and to have waived its illegality or the insufficiency of the security.

Beneficiaries may authorize or ratify that which otherwise would be a breach of trust.

Under such circumstances, when the substituted trustee has brought action in another State to foreclose a mortgage given to secure the unauthorized loan, and it is there decreed that some of the notes on which the beneficiaries were indorsers have outlawed, the cobeneficiaries are bound by that determination.

Beneficiaries who have litigated the above issues as between themselves, should not be allowed counsel fees or an extra allowance payable out of the estate, but such allowance to the accounting trustee is proper.

CROSS-APPEALS by the plaintiff, Charles H. Blair, as trustee of the estate of David Cargill, deceased, and by the defendants Panola C. Hampton and another, from portions of a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 12th day of July, 1905, upon the report of a referee, and

also from portions of an order entered in said clerk's office on the 19th day of May, 1905, granting certain extra allowances of costs.

*Alexander S. Lyman*, for the plaintiff.

*Henry A. Prince*, for the appellants Hampton and Stearns.

*Frederic R. Coudert*, for the defendants, respondents.

HOUGHTON, J.:

The defendants are residuary legatees of the fund held in trust under the will of David Cargill, deceased. On the termination of the trust the plaintiff brought this action to account and to charge the shares of defendants Hampton and Stearns with the amount of certain unauthorized loans made by former trustees to defendant Andrew H. Cargill, a cobeneficiary, on the ground that they consented to and participated in such loaning of the funds of the trust.

During the trusteeship of Frederick A. Brown, and in 1892, the trustee loaned to Andrew H. Cargill, out of the trust fund, \$20,000, taking his note therefor, indorsed by defendants Hampton and Stearns, and later, in 1897, he loaned \$1,800 more, taking therefor a note indorsed by defendant Stearns. Frederick A. Brown died and Walston H. Brown was substituted as trustee, and in the years 1898 and 1899 he loaned from the trust fund to Cargill \$13,200 more, upon two joint notes of Cargill, Hampton and Stearns. The moneys were used by Cargill in establishing a ranch in California, which was owned by a corporation, and on the last loan to him he caused the corporation to give to the trustee a mortgage for the entire \$35,000 which had been loaned to him.

Walston H. Brown resigned as trustee, and this plaintiff was appointed in his stead, and an action was instituted in the Superior Court of the State of California for the foreclosure of this mortgage. Defendants Hampton and Stearns were made parties thereto, and judgment was asked against them for the full amount of the notes which they had severally signed or indorsed. They appeared and interposed several defenses, including the Statute of Limitations, and on the 7th day of October, 1901, a judgment was rendered relieving them from liability as indorsers on the notes aggregating \$21,800 and charging them with the notes aggregating \$13,200 and interest. The real property was sold and the proceeds



App. Div.]

First Department, March, 1906.

of the sale applied, leaving unpaid of their liability thus established, the sum of \$3,435.80.

On the death of trustee Frederick A. Brown and the appointment of Walston H. Brown as his successor, an accounting of the trust fund was had. In the account appeared the item "California Ranch loan \$21,800." All of the defendants signed an instrument duly acknowledged, ratifying, approving and accepting the account containing this item, waiving every objection which might be made thereto, ratifying and approving the acts of the trustee therein set forth, and agreeing and consenting that upon the turning over of the securities therein mentioned to the substituted trustee, the estate of the deceased trustee should be fully absolved from liability and his bondsmen discharged.

When Walston H. Brown petitioned the Supreme Court to be permitted to resign, and that this plaintiff be appointed, he annexed to his petition a statement of the securities held by him belonging to the trust fund, and amongst them appeared "California Ranch loan \$36,350," being the \$35,000 loaned by him and his predecessor, in the manner specified, with accumulated interest. On this petition the court appointed a referee to take and state the accounts of the retiring trustee, and on the coming in of such report made an order directing all these defendants to show cause why such report, inventory and account should not be confirmed, and why the then trustee should not be discharged and his bond canceled. This order was duly served by publication and mailing on all beneficiaries, and no one appearing in opposition, a final order was made confirming the report and approving of the account and discharging the trustee and his bondsmen.

There is no suggestion that every one connected with the estate did not understand that "California Ranch loan" referred to the loan made to Andrew H. Cargill, and evidenced by his notes indorsed or signed by appellants Hampton and Stearns. The referee found that the loan was made direct to Cargill, the trustee taking the notes referred to as security, and there is no proof that appellants Hampton and Stearns received any of the moneys.

The appellants Hampton and Stearns conceded (except as herein after considered) their liability for the amount of the deficiency established by the California judgment, being the sum of \$3,435.80.

The judgment from which they appeal, however, charges them with liability, notwithstanding they were relieved therefrom by the judgment in the California court upon the \$21,800 of notes, and directs that after the share of Andrew H. Cargill shall have been exhausted in satisfaction thereof, their shares shall be charged with the deficiency and impounded for its payment. The theory upon which this recovery was had, and upon which it is sought to be sustained, is that knowledge that the trustee was making an improper loan and consenting that he do it, was sufficient to charge them with liability to their cobeneficiaries for the loss which resulted, although they received none of the money, and there was no fraud on their part, nor any fraudulent connivance to deplete the trust fund. And this, notwithstanding they had given their notes as security, which were accepted by the trustee, and which he permitted to outlaw as against them, and notwithstanding, also, the approval of the investment by the other beneficiaries, and the discharge by them of the trustees from any liability therefor.

If the plaintiff is to be permitted to go behind the legal obligations which Mrs. Hampton and Mrs. Stearns gave in the form of notes, and disregard the amount which was adjudged to be due upon them by the California judgment, it must be upon the theory that they committed some wrong with respect to the trust fund and towards their beneficiaries which was not wiped out by that judgment, and which was not condoned or approved by the other beneficiaries themselves.

On the facts established we fail to see that they incurred any such liability. Eliminating all fraud, as we must, the worst light in which they stand is that they knew an improper loan was being made to Cargill and assented to his receiving the money, and consented to sign his notes therefor and thereby to bind themselves during the lifetime of the notes for repayment of the money. The loan was negotiated between Cargill and the trustee. They were asked to become liable on the notes as additional security. This amounted in law to no more than a forceful assent.

The question is not one between a beneficiary and a delinquent trustee, where it is sought to charge him with loss upon an illegal or improvident loan. The present trustee did not make the improper loans. They came to his hands from the former trustees. If the

App. Div.]

First Department, March, 1906.

delinquent trustee were accounting, undoubtedly Mrs. Hampton and Mrs. Stearns would be estopped from claiming that he should make good to them the loss arising from the improper loan, for he would have a right to say that they could not question its propriety because they consented to it. The rule of law between beneficiaries themselves is quite different from that existing between a beneficiary and a trustee. Residuary legatees are under no obligation to restore, in the absence of fraud or collusion, a trust fund which has been wasted by the executors. (*Mills v. Smith*, 141 N. Y. 256.)

Counsel upon both sides concede their inability to find an authority in which the precise question is decided. After considerable research the one nearest in point in principle seems to be *Raby v. Ridehalgh* (7 DeG., M. & G. 104). There two life tenants prevailed upon the trustees to invest the trust in an unauthorized security in order to obtain an increased income. A loss of principal arose. The trustees were charged by the vice-chancellor with this loss, and the life tenants were held liable to reimburse them for the whole amount. On appeal this decree was modified, and the life tenants were held responsible only for such amount as the trustees had in fact paid over to them, the decision going upon the theory that there was no independent liability, but only one to restore that which they had received through the improper acts of the trustees induced by them.

*Ehlen v. Mayor, etc., of Baltimore* (76 Md. 576; 25 Atl. Rep. 917), relied upon by the respondents, is not in point. There four of the five beneficiaries had consented to the transfer of stocks held in trust and released to the trustees, and four-fifths of the funds realized had been thereby wasted. It was very properly held that the beneficiary who did not consent should take the one-fifth that remained.

Our conclusion is that mere knowledge of and consent to an unauthorized loan by a trustee on the part of a beneficiary, in the absence of fraud or collusion, or the receipt of any of the money, is not sufficient to create a liability against him to reimburse his cobeneficiaries for such loss as may occur.

But if the rule be more stringent than we conceive it to be, there is another reason why the judgment cannot be upheld. The respondent defendants waived any objection which they might have had that the loan was not one authorized by law, or that it was

improperly secured or improvidently made. They accepted the investments and ratified the accounts of the deceased trustee, which included the \$21,800 loan, and approved his acts, and released him from liability therefor by a formal instrument in writing. So, too, by failing to appear when the order was made discharging the retiring trustee, and to object that he had also made improvident and unauthorized loans, they must be deemed to have assented to the propriety of making them and to have waived their illegality or the insufficiency of security.

Parties of full age may arrange and settle and distribute an estate in which they are interested amongst themselves, without any formal decree of the court, and such settlement and arrangement, in the absence of fraud or undue advantage, is binding. (*Matter of Wagner*, 119 N. Y. 28; *Matter of Hodgman*, 11 App. Div. 344.) A release to a trustee in respect to a breach of trust committed in the investment of trust funds operates as an acceptance of the securities in which the funds have been invested. (*Blackwood v. Burrowes*, 2 Con. & L. 459.) A decree upon an accounting approving investments binds all parties to the proceeding, even though the investment be unauthorized by law. (*Matter of Denton v. Sanford*, 103 N. Y. 607; *Matter of Tilden*, 98 id. 434.) A beneficiary may authorize his trustee to do what otherwise would be a breach of trust, or release and agree to hold him harmless for such an act after it is done. (2 Perry Trusts [5th ed.], § 851; *Pope v. Farnsworth*, 146 Mass. 339.)

The legal effect, therefore, of the ratification and of the order sanctioning the account of the retiring trustee was to make the investments, so far as the respondent defendants are concerned, legal and proper ones. It became the duty of the present trustee, as it had been the duty of the discharged trustees, to enforce their collection. To do this the plaintiff went to the courts of California, and upon issue joined it transpired that the plaintiff could obtain judgment against defendants Hampton and Stearns only upon the two notes aggregating \$13,200, because the former trustees had permitted the Statute of Limitations to run against the prior notes. These former trustees had both been released not only from any liability that might arise out of their improper investments, but for any negligence because of failure to enforce the obligations which

App. Div.]

First Department, March, 1906.

they had taken. They were the primary debtors. The California judgment must be given full faith and credit (U. S. Const. art. 4, § 1), and by it is fixed the liability of the appellants Hampton and Stearns to the trust estate. The accounts of the trustees, which the defendant respondents accepted as true, stated that the liability was \$35,000. On testing that question it was found to be only \$15,000 and they are bound by that determination.

It is insisted that the deficiency established against appellants Hampton and Stearns by the California judgment is not wholly principal of the trust fund, but is made up in part of interest belonging to the life tenant and which she had waived. If this were the fact, it was incumbent upon the appellants to see that the judgment so provided. We think they are bound by the amount thereby established as principal due from them to the trust estate, and cannot now question its correctness.

The court granted an extra allowance to the plaintiff, and to the defendants appearing separately. The defendants were divided into groups, litigating against each other, and there is no reason why their counsel fees should be taken from the estate. The plaintiff was accounting, and the allowance to him was proper. In so far as the order appealed from grants an extra allowance to any of the defendants it should be reversed.

The judgment appealed from should be modified by providing that there be deducted from the shares of appellants Hampton and Stearns on account of the loan to Andrew H. Cargill the sum of \$3,435.80 only, with interest thereon from the date of entry of final judgment in the California action, and as so modified affirmed, with costs of the appeal to them, payable out of the estate.

The order granting extra allowances should be reversed in so far as it grants allowances to the defendants, and affirmed as to the allowance to the plaintiff, without costs.

O'BRIEN, P. J., INGRAHAM, McLAUGHLIN and CLARKE, JJ., concurred.

Judgment modified as directed in opinion, and as modified affirmed, with costs to appellants payable out of the estate. Order modified as directed in opinion, and as modified affirmed, without costs. Settle order on notice.

In the Matter of the Contract for Constructing the HUDSON WATER WORKS, and the Lien Filed Against Such Improvement by JOHN STACKPOLE, Respondent.

THE NATIONAL COMMERCIAL BANK OF ALBANY, Appellant.

Third Department, March 18, 1906.

**Mechanic's lien on public improvement — undertaking to discharge lien may be signed by assignee of contractor — Lien Law construed — when leave to submit new undertaking does not bar appeal from decision holding former bond to be insufficient.**

When an application to discharge a mechanic's lien on a public improvement has been denied with leave to renew upon the ground that the bond must, under the statute, be signed by the contractor and cannot be signed by his assignee, such leave does not bar an appeal from such decision as the right to submit a new bond exists without such leave.

The bond authorized to be given to procure the discharge of a lien upon a public improvement by section 20 of the Lien Law, as amended by Laws of 1898, chapter 169, and Laws of 1902, chapter 87, may be signed by the assignee of the contractor, although he is not within the express terms of said section. The section should be liberally construed to secure the beneficial intent and purpose thereof.

APPEAL by The National Commercial Bank of Albany from an order of the Supreme Court, made at the Columbia Special Term and entered in the office of the clerk of the county of Columbia on the 14th day of December, 1905, denying the appellant's application for the discharge of a lien upon moneys due for the construction of water works in the city of Hudson.

Hurd, Sherman & Company, a corporation, had contracted with the city of Hudson for constructing a part of the system of water works which was authorized by chapter 187 of the Laws of 1904, One John Stackpole filed with the city treasurer of Hudson a notice of lien on the said public improvement to the amount of \$822. The National Commercial Bank of Albany presented to a justice of the Supreme Court an undertaking, which was signed by itself as principal and with the American Surety Company of New York as surety, and asked for a discharge of the lien of said Stackpole. By affidavit upon the application it was shown that this contract of Hurd, Sherman & Company, and all moneys due and to grow due

App. Div.]

Third Department, March, 1906.

thereon, had been assigned by the said corporation to the said bank. The justice hearing the application made the following order :

"The National Commercial Bank of Albany having executed an undertaking with the American Surety Company of New York as surety, and having served a copy of the same together with a notice that the said undertaking would be presented to me at my chambers in the city of Hudson, N. Y., on the 4th day of November, 1905, at 9 A. M., and that the surety thereunder would justify at such time and place, and said special proceeding having been duly adjourned from time to time to this date ;

"Now, on reading and filing the said undertaking and notice, and due proof of service filed therewith, and the affidavit of J. Murray Downs, verified November 16, 1905, and it appearing to me that the said undertaking is not such an undertaking as is contemplated by the Laws of 1897, chapter 418, section 20, subdivision 5, as amended by Laws of 1898, chapter 169,\* and for that reason I have decided to decline to pass upon the sufficiency of the said undertaking, or its form, or the sufficiency of the surety, and after hearing Rosendale & Hessberg, attorneys for The National Commercial Bank of Albany, and Brownell & Tilden, attorneys for the above-named lienor,

"It is ordered, that the said application to file the said undertaking for the purpose of discharging the said lien be, and the same hereby is, denied, on the ground that the said undertaking is not such an undertaking as is contemplated by Laws of 1897, chapter 418, section 20, subdivision 5, as amended by Laws of 1898, chapter 169, and without prejudice, however, to a renewal on additional papers."

From this order the National Commercial Bank of Albany has appealed to this court.

*Rosendale & Hessberg* [*J. Murray Downs* of counsel], for the appellant.

*Brownell & Tilden* [*John L. Crandell* of counsel], for the respondent.

---

\* See Lien Law (Laws of 1897, chap. 418), § 20, subd. 5 (added by Laws of 1898, chap. 169 and re-enacted by Laws of 1902, chap. 87).— [RMR.]

SMITH, J. :

The right of the appellant to appeal from this order is challenged because of the privilege given therein to renew the motion upon additional papers. The application was denied because a proper bond was not presented. If the right to renew upon another and proper bond were dependent upon this permission the order would probably not be such a final order as to authorize an appeal. (See *Robbins v. Ferris*, 5 Hun, 286; *Wells, Fargo & Co. v. W., C. & P. C. R. R. Co.*, 12 App. Div. 49.) The bank, however, might without such permission have presented another bond and might have asked the judge to approve of the same. The permission, therefore, to apply upon additional papers would seem to give no further right to the appellant than it would otherwise have. Notwithstanding such privilege, therefore, it may consistently appeal if the approval of its bond was improperly refused.

Section 20 of the Lien Law (Laws of 1897, chap. 418, as amd. by Laws of 1898, chap. 169, and Laws of 1902, chap. 37) provides for the discharge of a lien for a public improvement. It is therein provided that a lien against the amount due or to become due a contractor from a municipal corporation for the construction of a public improvement may be discharged as follows :

“ \* \* \* Either before or after the beginning of an action by a contractor executing an undertaking with two or more sufficient sureties, who shall be freeholders, to the State or the municipal corporation with which the notice of lien is filed, in such sums as the court or a judge or justice thereof may direct, not less than the amount claimed in the notice of lien, conditioned for the payment of any judgment which may be recovered in an action to enforce the lien. \* \* \* The execution of such undertaking by any fidelity or surety company authorized by the laws of this State to transact business shall be equivalent to the execution of such an undertaking by two sureties.”

The holding of the learned judge seems to have been that the bond was insufficient because it was signed, not by the contractor, but by the National Commercial Bank, the assignee of the contractor, and that in order to procure a discharge of the lien under this provision of the law the bond must be signed by the original contractor with the municipality. No other criticism is made of



App. Div.]

Third Department, March, 1906.

the bond presented. In section 2 of the Lien Law the term "contractor" is defined as "a person who enters into a contract with the owner of real property for the improvement thereof." By strict interpretation this would seem to exclude either the personal representatives of a deceased contractor or his assigns. Under the strictest interpretation of the statute an assignee of the contractor might procure a discharge of the lien if only the contractor himself be upon the bond. No reason is suggested, however, why the bond of the contractor should be required and the bond of the assignee prohibited, nor can any reason be assigned why the representatives of a deceased contractor should not be allowed to procure this money upon the giving of a bond with a sufficient surety. The surety must be approved by the court or a judge or justice thereof, which is ample protection to the municipality. It can hardly be conceived that the legislative intent was to bar the representatives of a deceased contractor from this right to procure a discharge of the lien or to bar an assignee of the contract from recovering the moneys which are his by assignment duly made, providing the contractor refused to join in the undertaking. We are of opinion, therefore, that this provision should not receive the strict construction contended for by the respondent, but that within the permission of the statute an assignee of the contract and of the moneys due thereupon may procure a discharge of the lien by filing an undertaking in which the assignee shall appear as principal and with such surety as is provided by the act of which the court or a judge or justice thereof may approve.

We are not unmindful of the change in the phraseology of the Lien Law from former lien laws, as found in section 14 of chapter 315 of the Laws of 1878, as amended by chapter 629 of the Laws of 1892. In that act the term "contractor" was in part defined as the person with whom the contract with the city is made, his "assigns or legal representatives." In the present act the words "assigns or legal representatives" are omitted from the definition of the term "contractor." *Prima facie* this would seem to indicate an intent on the part of the Legislature to deprive either the assignee or the legal representatives of a contractor of the benefits of this provision of subdivision 5 of section 20 of the act of 1897, as added by chapter 169 of the Laws of 1898 and re-enacted by

chapter 37 of the Laws of 1902. The contention that such an amendment is not conclusive evidence of such intent finds some support in our holding in *Matter of Oullinan (Maher Certificate)* (109 App. Div. 816). The inconvenience that would arise from the strict construction of the statute which has been given by the learned judge before whom the application was made, and the inability of respondent's attorney to suggest any conceivable ground for withholding either from the representatives of a deceased contractor or from his assignee the right to make this application, lead us to give to the statute a liberal interpretation, and to hold that the assignee stands in the place of the contractor, and is entitled to the privilege given to the contractor by the provisions of the statute quoted. It is provided in the act itself, by section 22, that article 1 thereof, in which all the sections cited are contained, "is to be construed liberally to secure the beneficial interests and purposes thereof." By section 32 of the Statutory Construction Law (Laws of 1892, chap. 677, as amd. by Laws of 1894, chap. 448) it is provided: "The provisions of a law repealing a prior law, which are substantial re-enactments of provisions of the prior law, shall be construed as a continuation of such provisions of such prior law and not as new enactments."

The order of the justice refusing to approve the undertaking as sufficient should be reversed.

All concurred; COCHRANE, J., not sitting.

Order reversed, with ten dollars costs and disbursements, with leave to renew application upon the same or additional papers to any justice of the Supreme Court.

---

JENNIE M. CONWAY, Respondent, v. LAWRENCE COONEY, as Administrator, etc., of LUKE COONEY, Deceased, Appellant.

Third Department, March 7, 1906.

**Executors and administrators — claim against estate for board furnished by decedent's daughter — failure to show promise to pay — when no recovery on quantum meruit.**

The plaintiff, a married woman, who had lived with her father in his house, which she managed for the mutual benefit of her own family and her father, and for which she paid no rent, made a claim against his estate for board furnished during his life. The referee made no finding that the decedent ever

App. Div.]

Third Department, March, 1906.

promised to pay the plaintiff any sum whatever for the board furnished, or that the plaintiff ever promised to pay anything for the use of the house furnished by the decedent. It was also shown that she had never presented a bill for the board furnished, although she had made out a bill during his lifetime. *Held*, that upon the facts found no action arose against the father to pay upon a *quantum meruit*;

That evidence of an alleged conversation between the decedent and the claimant's husband, in which decedent said that he thought it would be cheaper for him to board with the plaintiff, and that he would pay her three dollars and fifty cents a week, and other evidence of the plaintiff's daughters substantially to the same effect, was inconsistent with an agreement to pay what the board was worth, and that such evidence was insufficient to show a definite promise to pay; That as between father and daughter living in the same family an express contract to pay for board must be established by clear and convincing proof; That a judgment for the claimant should be reversed on the law and the facts.

APPEAL by the defendant, Lawrence Cooney, as administrator, etc., of Luke Cooney, deceased, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Washington on the 9th day of March, 1905, upon the report of a referee.

This is an appeal from a judgment entered upon the report of a referee, appointed under section 2718 of the Code of Civil Procedure. In 1884 the plaintiff, Jennie Conway, who is a married daughter of the deceased, Luke Cooney, left her husband's home and, with her two children, went to live with and to work for her father at an agreed price, as claimed, of three dollars per week. Her father was then an old man, and was living in his own house without a wife or other member of his family to keep house for him, except a young daughter about eleven years of age. In December, 1888, that daughter died, and from and after the next summer this plaintiff, instead of working for her father, seems to have taken charge of the house, furnished all the means necessary to run the same, and the father thenceforth boarded and lodged with her continuously up to the time of his death, which occurred in February, 1902. It appears that in 1901, and while the father was still living, the plaintiff made out a bill against him for work and labor rendered to him from 1884 up to that time, but it appears that such bill was never presented to him. In September, 1903, a bill was presented to the administrator in which the plaintiff seeks to recover

from his estate for board and lodging furnished to him from 1889, at the rate of fifteen dollars per month, up to December 8, 1901, and from and after that date at the rate of ten dollars per week until his death. Such bill, so presented, was rejected by the administrator and was referred under the statute and tried before the referee to whom so referred. Such referee reported in favor of the plaintiff in the sum of \$1,524.71, and from the judgment entered thereon this appeal is taken.

*P. C. Dugan and Abner Robertson*, for the appellant.

*J. B. McCormick*, for the respondent.

PARKER, P. J. :

It seems that from 1884 to 1889 the plaintiff worked for her father, the deceased, Luke Cooney, in his family, under such circumstances as indicated that the services so rendered were not for him but for the mutual benefit of her own family and that of her said father, and no claim is made by her in this proceeding for any service rendered during that period. In December, 1888, however, it appears that the young daughter of her said father, who had previously lived with him, died, and a young son left him and went away to earn his own living. That left the father the only member of his family, and the plaintiff and her two daughters still living in the house with him; her family consisted of three, while his had become reduced to one. The referee, in his "Eighth" finding of fact, finds that at that time a new contract was made between the plaintiff and her said father, which went into effect August 1, 1889. What the terms of that contract were he does not find, but he finds what they did thereafter substantially as follows: That from that date the father furnished a furnished house to the plaintiff, her family and her guests, including rooms to conduct dressmaking in, and a supply of garden truck, reserving a store on the ground floor of the cottage and certain outbuildings in the rear thereof; and that the plaintiff furnished to her said father necessary table board, room care, including cleaning and heating, necessary washing, mending and nursing, and that this condition continued up to the time of her father's death, which occurred February 18, 1902, at the age of eighty-two years.

App. Div.]

Third Department, March, 1906.

There is a finding that the board, etc., so furnished was worth \$5 per week, and that the house, etc., so furnished by the father to the plaintiff, was worth the sum of \$125 per year, but there is no fact found indicating that the father ever promised to pay to the plaintiff any sum whatever for the board, etc., so furnished him, nor that the plaintiff ever promised to pay anything whatever for the use of the house, etc., so furnished to her. I discover no finding of any fact in the report, other than as above stated, showing that the father ever became liable to pay for the board, etc., so furnished him.

From the facts so found I am of the opinion that no inference can be drawn that either party promised to pay to the other any money whatever. What they did do we may assume they agreed to do; but what is there in such facts indicating that the father agreed to pay to his daughter what such board, etc., was fairly worth, or what to indicate that the daughter then agreed to pay or allow to him what the use of the property she so occupied and received was reasonably worth in the market? In my judgment, from such facts it is rather to be inferred that what the daughter received from the father was deemed satisfaction for what she furnished to him, and particularly should this be inferred when we consider that at no time during the twelve and a half years that this condition continued did the daughter complain against the father for more payment for his board, or never at any time did either of them make any attempt to adjust what such board, etc., was reasonably worth, or what fairly ought to be charged against the daughter for her use of the house and garden truck that she occupied and enjoyed. So far as the facts found by the referee are concerned, it would seem that after the year 1889, as before, the arrangement with the father was that they should still live as one family, both contributing as best they could to the general expense of their living. Concededly the daughter was a dressmaker by trade, and could earn more or less that way. Concededly the father was an old man, without work and unable to longer carry on his store, which was then rented for \$100 per year, and which seems to have been his sole and only income save what he could raise in his garden. Each put in all they had. The father, from time to time, paid such money as he could spare towards the common support,

and from time to time the daughter wrote to her brothers for assistance, and usually seems to have received it, and never complained that her father did not pay what he had agreed to. I conclude that from the facts found in the referee's report no cause of action arises against the father to pay upon a *quantum meruit* for the board, etc., that he so received, and evidently no direct promise to so pay is to be found therein.

It is claimed by the plaintiff, however, that there is evidence in the case from which a direct promise to pay what the board was fairly worth might have been found by the referee. Such evidence is claimed to have been given by John Conway, the husband of the plaintiff, and by her two daughters, Mamie and Hattie. That of the husband is to the effect that the father told him, soon after the daughter Katie's death, that he thought it would be cheaper for him to board with the plaintiff, and that he would pay her three dollars or three dollars and one-half per week. If this is to be of any force it repels the idea of an agreement to pay what the board was worth, and fixes the price at not more than three dollars and one-half per week. But it falls far short of proving that any agreement for any price was ever made. The daughter Mamie is substantially to the same effect, except that he would pay what the board was worth. The daughter Hattie goes a step farther, and says that she heard the father tell the plaintiff that now Katie was dead it would be cheaper for him to board with her, and that the mother replied that she would run the house and he could board with her. She heard nothing said as to price, nor does she state that anything was said as to how she was to be paid. She heard them say, however, that he would fix up a room for her to carry on the dressmaking business and she could carry it on.

I have carefully read the evidence of these witnesses, and I can understand why the referee has not attempted to state the terms of the contract then and there made between the parties. Neither of these witnesses state enough to show any definite agreement made, and from all their evidence we cannot conclude, with any certainty, that the deceased then assumed any obligation to pay any sum for his board, nor to in any way compensate the plaintiff therefor, other than such as she would derive from the use of his house and property in the manner above described.

App. Div.]

Third Department, March, 1906.

It must be borne in mind that the conduct of the plaintiff, during all these years, is utterly inconsistent with the contract sought to be deduced from this evidence. She did not keep any account against her father for the board, etc., now claimed, nor does she seem to have credited him with anything whatever for the use of the house, etc., received from him. As late as 1901, and while he was still living, she made up a bill against him. But instead of *then* claiming that he had been boarding with her since 1889 and charging for that, she claims that all the time from 1884 down she had been keeping house for him at the rate of three dollars per week, thus utterly ignoring any change in the relations made in 1889. So in the bill that she presented to the administrator after her father's death, and which was referred in this proceeding, she claims the contract made in 1889 was for board at the price of fifteen dollars per month, thus squarely contradicting the conclusion of the referee that the deceased was to pay what it was reasonably worth, viz., five dollars per week. And in such last bill she does not give any credit whatever for the use by her of the house, etc., which concededly she has had, thus again contradicting the supposed contract made in 1889 and upon which the conclusion of the referee seems to be based. Certainly there is not sufficient evidence to warrant the finding of a contract that adds anything to the obligations which may fairly be implied from the conduct of the parties merely, and that, as we have already seen, is not sufficient to sustain the claim now made by the plaintiff. As between father and daughter living in the same family we should not conclude that such a direct contract existed, except upon clear and convincing proof. (*Matter of Hart v. Tuite*, 75 App. Div. 323, 324; *Robinson v. Carpenter*, 77 id. 520; *Matter of Van Slooten v. Wheeler*, 140 N. Y. 624.)

My conclusion is that the judgment should be reversed on the law and the facts and a new trial granted, with costs to appellant to abide the event.

All concurred.

Judgment reversed on law and facts. Referee discharged and new trial granted, with costs to appellant to abide event.

JOHN J. FLYNN, Respondent, v. FRANK SULLIVAN SMITH, Appellant.

First Department, March 16, 1906.

**Sale — conversion — secured debt sold as worthless by assignee for benefit of creditors — mutual mistake of fact — error in excluding evidence that purchaser did not know debt was secured — when sale should be rescinded because minds of parties have not met — counterclaim asking rescission requires reply.**

The plaintiff's assignor pledged securities with certain brokers as collateral security for speculations in stock on a margin. After a general assignment for the benefit of creditors by said brokers, the assignee, not knowing that the plaintiff's assignor's debt to the brokers was secured, scheduled the debt as worthless and sold the same at auction for a nominal sum, the debt being bought in by an attorney acting in the interest of the plaintiff's assignor. Thereafter the plaintiff's attorney demanded the security as an incident to the debt purchased, but the assignee refused to deliver the same, offering to return the amount paid at auction for the debt. In an action against said assignee for the benefit of creditors for a conversion of said security, he set up as a defense his lack of knowledge that the debt was secured, and as a counterclaim prayed for a decree rescinding the sale of the debt.

*Held*, that it was error to exclude testimony by the attorney who purchased the debt showing that he did not know that the debt was secured when he bought it, and his answers to questions inquiring how he came to buy the account. As it appeared that the defendant did not know that the debt was secured, such testimony tended to show that the parties had made a mutual mistake concerning a material fact which would have required a rescission of the sale.

*Held*, further, that, though collateral security follows the debt, as the parties to the sale were equally ignorant that the debt sold was secured, a rescission of the contract may be had not only on the ground of fraud or mutual mistake, but also upon the ground that, owing to a lack of knowledge of a material fact, the minds of the parties had never met.

*Held*, further, that, as the counterclaim asked the rescission of the sale as affirmative relief and the plaintiff had not replied thereto, the defendant's motion for judgment on the counterclaim should have been granted.

APPEAL by the defendant, Frank Sullivan Smith, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 6th day of July, 1905, upon the verdict of a jury rendered by direction of the court after a trial at the New York Trial Term, and also from an order entered in said clerk's office on the 12th day of July, 1905,



App. Div.]

First Department, March, 1906.

denying the defendant's motion for a new trial made upon the minutes.

*George Cogill*, for the appellant.

*Charles De Hart Brower*, for the respondent.

LAUGHLIN, J. :

This is an action for the conversion of ten shares of the capital stock of the Crocker-Wheeler Electric Company. One Alfred W. Law owned the stock and had pledged the same to Henry Marquand & Co., stockbrokers, as collateral security to his account as their customer speculating in stocks on margins. The brokers made a general assignment for the benefit of creditors to the defendant. Their books showed that Law was indebted to them in the sum of \$4,120.23. The defendant as such assignee duly advertised and sold the claim at public auction. It was purchased for \$10 by one Hunter, a lawyer, and the next day the defendant executed and delivered to him an assignment thereof, with a statement of the account annexed, assigning all defendant's "right, title and interest in and to any and all sum or sums of money now due, or to grow due, upon the annexed account, which said account was duly assigned to me by the firm of Henry Marquand & Company." The stock came into the possession of defendant as assignee, but the books did not show, and he was not aware, that it was held as collateral to Law's account until seven days after the sale, when Hunter demanded it upon the ground that it passed to him as incidental to the account. The defendant declined to deliver it and offered to return the ten dollars purchase price of the account, which was refused.

Neither the account itself nor the advertisement or assignment thereof contained any reference to this stock or indication that any security had been put up or held as margin. Within two months after the sale of the account the defendant sold the stock for \$1,120, which was apparently its fair market value then and also at the time of the sale of the account.

Hunter subsequently assigned to plaintiff the claim against Law on the account, all his right to the stock and his claim against defendant for refusing to deliver it,

The defendant set up as a separate defense and as a counterclaim that he did not know that this or any stock was held as margin to Law's account; that he did not intend to sell the stock with the account or to execute any assignment thereof to him; that the sale and assignment were made under the misapprehension that there was no margin to secure Law's claim; that Hunter was acting for Law in purchasing the account, and he demanded the rescission of the sale and cancellation of the assignment upon his restoring the consideration. The defendant testified to these facts, and they are not expressly contradicted. He further showed that in the inventory and schedule filed by him as assignee he described this claim against Law as an account receivable, \$4,120.42, of "no value" and "uncollectible," and he included this stock in a schedule of securities found in the safe deposit vault which, on information derived from clerks of his assignor, he inventoried as "believed to be lodged by clients for safe keeping, and to which the assignors had no claim by way of title or lien, and consequently unappraised." There was no reference to this stock on the ledger containing Law's account. The only reference in the books of the assignors to the stock was in the register of securities in the cashier's safe, which indicated that they belonged to Law, and this was referred to in a note to the schedule in which they were inventoried without having been appraised. According to the testimony of Law, Hunter did not know until after the sale that the account was secured by this stock, and, on objection interposed by counsel for plaintiff, the court excluded Hunter's testimony on this point, upon the ground that it was immaterial whether or not Hunter knew what he was purchasing. The court also sustained an objection to a question put to Hunter by counsel for defendant inquiring how he came to buy the account, and defendant took an exception. Those rulings were manifestly erroneous.

It clearly appeared that the defendant did not intend to sell any right or interest in the stock, and if this evidence had been received, it might have conclusively appeared that Hunter did not intend to buy any right or interest therein. (*Brown v. Lamphear*, 35 Vt. 252.) This evidence, with that already in, might have shown a mutual mistake concerning a material fact which would have required a rescission at the instance of the party prejudiced. It is

App. Div.]

First Department, March, 1906.

true that the collateral goes with the debt, and the owner of the debt holds it as trustee for the debtor, and, therefore, it passes as incidental to a sale of the debt, and yet it is usually, and especially in this case, a very important incident — many times more important than the debt itself. Knowledge of it, therefore, cannot be immaterial. If, on the other hand, Hunter knew that the stock was pledged as collateral to the account, he must have learned it from Law, with whom he occupied offices and for whom he was acting in part without a definite arrangement as to their respective interests. Law knew all the facts, including the value of the stock, and undoubtedly knew that the defendant had scheduled the account as worthless and the stock as merely held on deposit; and if Hunter knew these facts, as is quite likely, he was under a duty to disclose them to the defendant, who was acting in a trust capacity and was not, owing to the condition of the books, chargeable with negligence.

However, the action is not defended on that theory, and there are other grounds upon which this unjust judgment may be reversed. The defendant knew that he was selling the account, which he had inventoried as valueless and which brought ten dollars; but he had no knowledge as to the existence of the stock as collateral, and he did not intend to sell for ten dollars a secured debt worth more than one hundred times that sum. Nothing was done to lead the plaintiff's assignor to believe that he was to receive the collateral, and he could only have known of the existence thereof through Law. The defendant could not have intended to part with any interest in the securities, since he did not know that he held them as collateral. If, as already observed, plaintiff's assignor was equally unaware of the fact that the stock was held as security, he could not have intended to purchase the right to the security. In these circumstances, even if the form of the sale would in law carry the securities to the plaintiff, it is clearly a case for rescission on the ground that the minds of the parties never met as to the property and property rights.

Moreover, the defendant merely asks a rescission of the contract, not a reformation. He does not ask to retain the purchase price and have the contract so amended as to except the stock. He offers to return the consideration and to restore the plaintiff's

assignor to his former position, and asks like restoration for himself. In such case relief may be had not only on the ground of fraud or mutual mistake, but also upon the ground that, owing to lack of knowledge of a material fact by the party seeking the relief, without negligence on his part, the minds of the parties never met with respect to the property or property interests transferred, or even the consideration therefor. (*Smith v. Mackin*, 4 Lans. 41; *Bedell v. Bedell*, 37 Hun, 419; *Croove v. Lowin*, 95 N. Y. 423; *Duncan v. N. Y. Mutual Ins. Co.*, 138 id. 88; *Moffett Co. v. City of Rochester*, 82 Fed. Rep. 255; S. C., 178 U. S. 373; *Harris v. Pepperell*, L. R. 5 Eq. 1; *Werner v. Rawson*, 89 Ga. 619; *Diman v. Providence W. & B. R. R. Co.*, 5 R. I. 130; 24 Am. & Eng. Ency. of Law [2d ed.], 618.) The facts of the case at bar fairly bring it within this rule of law.

No reply was served to defendant's counterclaim for rescission. The counterclaim was good. The facts pleaded constituted not only a defense to the action for conversion, but ground for affirmative relief to have the sale of the account rescinded. At the commencement of the trial the defendant moved for judgment on the counterclaim, which was denied, and he excepted. We think this was error also; but since defendant did not rest on his exception, but offered proof of the facts, we think that we should not direct final judgment on the counterclaim.

It follows that the judgment and order should be reversed and a new trial granted, with costs to appellant to abide the event.

O'BRIEN, P. J., and INGRAHAM, J., concurred; McLAUGHLIN and HOUGHTON, JJ., concurred in result.

Judgment and order reversed, new trial ordered, costs to appellant to abide event. Order filed.

App. Div.]

First Department, March, 1906.

BYRON O. HUNTINGTON, Appellant, v. MORRIS S. HERRMAN,  
Respondent, Impleaded with GERSON STEIN.

First Department, March 16, 1906.

**Conversion — agreement by landlord that tenant may store property on premises after expiration of lease — landlord not liable for conversion by reason of removal of such property by new tenant.**

When a lessee, whose lease has expired, has been allowed by his lessor to store personal property in a loft of the building until the building is leased, he cannot recover as for a conversion against his former landlord because said property has been moved out without notice by a new tenant who leased the entire building, since the owner in leasing the building to the new tenant was merely exercising a legal right.

*Quære*, as to whether an action for damages would lie against the owner of the building.

APPEAL by the plaintiff, Byron O. Huntington, from a judgment of the Supreme Court in favor of the defendant Morris S. Herrman, entered in the office of the clerk of the county of New York on the 28th day of February, 1905, upon the verdict of a jury, rendered by direction of the court after a trial at the New York Trial Term, and also from an order entered in said clerk's office on the 9th day of March, 1905, denying the plaintiff's motion for a new trial made upon the minutes.

*James F. O'Niell*, for the appellant.

*Benjamin N. Cardozo*, for the respondent.

LAUGHLIN, J. :

The action is for the conversion of five sewing machines, certain office fixtures and furniture and other personal property, of the alleged value of \$8,500. During a period of about two years prior to the 1st day of February, 1898, plaintiff conducted the business of manufacturing ladies' underwear in the third loft of premises Nos. 68 and 70 Grand street, New York, under a lease from the Merchants' Central Club. The defendant Herrman then became owner or succeeded to the right to possession of the premises, and he leased the loft to the plaintiff for the month of February for a rental

of fifty dollars. Plaintiff was closing out his business, but had not finished doing so by the first of March and desired to continue in possession for two months longer and to leave the property, to recover for which the action is brought, until the premises should be again rented by his new landlord. On or prior to the first day of March he informed Herrman's brother that he desired the privilege of keeping the property there until the loft was rented and was willing to pay for the privilege twenty-five dollars per month for the months of March and April, and was informed that there would be no objection to his leaving the property there, provided he agreed to remove it within two days after being notified that the building had been rented. The rental was subsequently changed to fifty dollars for March and twenty-five dollars for April. The respondent's brother then suggested that appellant, when ready to move his other things out, send word so that a memorandum could be made of the property he desired to leave. Plaintiff paid the rent for the two months, and some time after the last payment, which was on April eleventh, he moved out, leaving the property of which a memorandum was taken — but no receipt was given — together with his address at which he might be reached "if the goods were to be removed." The plaintiff subsequently — it does not appear just when — received notice from the respondent that the loft had been rented and requesting that he remove his *signs* and put them on the first floor so that the new tenant could put out signs. This request was complied with, and while doing so plaintiff was informed by the elevator boy that it would be necessary also to move the *other property*, and that it might be placed in the first loft. After some negotiations it was agreed that appellant and respondent should together bear the expense of cleaning the first loft to put in suitable condition to leave the property there, and this was done and the property was transferred accordingly. The plaintiff thereafter from time to time visited the premises for the purpose of seeing his property, to which he was given access. In December, 1899, plaintiff learned that his property was being removed, and on visiting the premises he found it on the sidewalk, where it had been placed by the elevator boy on orders from the defendant Stein, to whom Herrman had in July or August, 1898, leased the entire building and surrendered possession. Herrman did not assume to

App. Div.]

First Department, March, 1906.

lease plaintiff's property to Stein, or to confer any right concerning it, and had a distinct understanding with Stein that the right was reserved to enter at any time and remove any property left by tenants; and he had no knowledge that Stein contemplated removing the property.

The defendant Stein was not served and did not appear. The verdict in favor of the defendant Herrman was directed upon motion of his counsel, made upon the grounds (1) that the plaintiff had failed to establish a cause of action of any kind; (2) that the plaintiff's cause of action, if any, was not for conversion, but for breach of a contract of bailment, and that the sole cause of action pleaded in the complaint was one for conversion; (3) that the defendant's possession being originally rightful, a demand was necessary to make it unlawful; that such demand was a condition precedent to the maintenance of an action for conversion, and that none had been proved.

It appears that Herrman did not notify plaintiff that he had leased the premises to Stein, or request him to remove the property. We are not in accord on the question as to whether the notice to remove in the event that the premises should be leased was for the benefit of the defendant Herrman alone, or whether he owed a duty to the plaintiff to give such notice; but that is not material, because if such duty existed a breach thereof might give rise to a cause of action for damages for breach of the contract, but it would not constitute a conversion of the property. It is unnecessary to decide whether the facts give rise to any cause of action *ex contractu*, for, the complaint being in conversion, no recovery could be had without proof thereof. (*Wamsley v. Atlas Steamship Co.*, 168 N. Y. 533, 540.) The defendant Herrman exercised no dominion over the property. In the exercise of his legal right to sell or lease the premises, he leased the entire building, but not its contents. The defendant Stein thus came into possession of the building, subject to the rights of the plaintiff. Clearly, the mere execution of a deed or lease of the premises and surrender of possession thereof to another does not render the owner liable in conversion for all the property of the tenants of the building either as to tenants in possession and occupation or as to those who have left some of their property temporarily. (*Peck v. Knox*, 1 Sweeny [N. Y. Super.

Ct.], 311; *Salt Springs Nat. Bank v. Wheeler*, 48 N. Y. 492; *Wamsley v. Atlas Steamship Co.*; *supra*, and cases cited.)

The contract by which the goods were left does not differentiate the case—considered as an action for conversion—from one in which the goods were left after the removal of a tenant by summary proceedings, as in *Peck v. Knox* (*supra*). Plaintiff saw fit to leave his property in the building, not for a month or two or three, but for a year and eight months, inspecting it himself at intervals. It was not reasonable to expect that defendant had surrendered his right to sell or lease his property indefinitely. In fact the execution of a lease by him was contemplated, and if plaintiff was entitled to any notice at all it was, according to the contract, only to be given after the premises *had been* leased. He did not lease it until after three or four months, and the property was not disturbed until nearly a year and a half thereafter. It is sufficient to sustain the judgment that it has not been shown that defendant Herrman exercised any dominion over the property. The execution of the lease and transfer of possession was lawful and invaded no right of the plaintiff with respect to the ownership or possession of the property. The possession of the property was not disturbed. The plaintiff, under the arrangement with Herrman, in effect had a lease of the space occupied by the property, terminable on notice, or a license to leave the goods there until notified to remove them. It did not constitute conversion of the property for Herrman to lease the building subject to plaintiff's right which is, in effect, what he did. If this action for conversion could be sustained then it would be for failure to notify plaintiff of the lease to Stein and even though the property were still in the building uninjured.

It follows that the judgment and order should be affirmed, with costs.

O'BRIEN, P. J., INGRAHAM, McLAUGHLIN and HOUGHTON, JJ., concurred.

Judgment and order affirmed, with costs. Order filed.



MYER HELLMAN, Appellant, v. THE CITY TRUST, SAFE DEPOSIT AND  
SURETY COMPANY OF PHILADELPHIA, Respondent.

First Department, March 16, 1906.

**Suretyship—bond to secure proper performance of contract—when surety is bound by parol waivers of provisions of contract—estoppel of surety.**

Although the provisions of a contract of suretyship cannot be waived so as to bind the surety, except by an agreement in writing, yet where a surety has given a bond to secure the proper performance of a contract to excavate rock, and at the instance of the contractor the surety has consented that the time of the performance of the contract be extended, and that percentages which were to be retained be paid to the contractor to enable him to continue the work, such waivers of the terms of the contract inure to the benefit of the surety and it is estopped from asserting that it is relieved from liability thereby, although the waiver as to the payments to the contractor were made by parol.

APPEAL by the plaintiff, Myer Hellman, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 19th day of May, 1905, upon the dismissal of the complaint by direction of the court after a trial at the New York Trial Term, and also from an order entered in said clerk's office on the 23d day of May, 1905, denying the plaintiff's motion for a new trial made upon the minutes.

*John A. Straley*, for the appellant.

*William R. Conklin*, for the respondent.

LAUGHLIN, J. :

The complaint shows that on the 7th day of December, 1898, the plaintiff entered into a contract in writing with one Blake, by which the latter agreed to do certain work consisting of blasting rock and excavating for sewer connections on premises at the northwest corner of Madison avenue and One Hundred and Seventeenth street on or before the 15th day of July, 1899, and other work consisting of blasting and removing rock from the same premises on or before the 15th of May, 1899; that Blake as principal and the defendant as surety duly executed a bond to the plaintiff in the penalty of \$10,000, conditioned for the faithful performance of the contract by Blake; that the contract provided that partial payments

should be made on account of the contract work every fifteen days on certificates of a designated surveyor as to the amount earned, but that fifteen per cent should be reserved until the completion of the work; that the plaintiff kept and performed all of the terms and provisions of the contract except that "with the full knowledge, approval and consent of the defendant" the provision with respect to reserving the fifteen per cent until final payment was *waived* and that with like knowledge, approval and consent of the defendant there was a substitution of surveyors and an extension of the time of performance from time to time, and that the provisions as to strict performance thereof on the part of Blake and the plaintiff were *waived* by the defendant; that Blake failed to perform and abandoned the contract and refused to proceed therewith as therein required and the plaintiff was obliged to proceed with the work and to expend in the performance thereof including the amount paid to Blake more than the penalty of the bond above the contract price.

Counsel for plaintiff in opening the case did not waive any right of his client to prove the material allegations of his complaint or make any admission inconsistent therewith. He stated that plaintiff would prove that during the progress of the work Blake was falling behind in paying for the labor and that Blake, plaintiff and plaintiff's counsel called on defendant, and Blake requested the defendant to consent to the payment of the full amount earned from time to time without deduction in order that he might be able to perform the contract and that with full knowledge and consent of all the parties the provision with respect to withholding the fifteen per cent was waived and thereafter payments in full were made; that the time of performance was first extended forty-five days with the consent in writing of the defendant, and that thereafter when Blake was again in default with respect to the time of completion a conference was had between him, plaintiff and defendant, and with the full knowledge and consent of the defendant the time of performance was further extended from time to time and strict performance as to time was "wholly waived by the defendant;" that subsequently at a like conference between all the parties a substitution of surveyors was agreed upon and that thereafter with full knowledge and approval of defendant Blake continued the work receiving payments in full from time to time on the certificate

of the substituted surveyors until the middle of May, 1900, when he abandoned the contract having a large part of the work uncompleted; that after giving the notices required by the contract and continued default on the part of Blake and notice to defendant of his default and an opportunity to it to take charge of and complete the work, plaintiff completed it at an expense including the payments made to Blake over the contract price of more than the penalty of the bond. The judgment was granted and is sought to be sustained upon the theory that parol evidence is not admissible to show the facts alleged and offered to be proved.

The defendant's contract being one of suretyship it is claimed that it could not be waived in any of the three particulars specified except by an agreement in writing. Of course a valid new contract could not be made by parol nor could the liability of the surety be enlarged or extended by parol. Here, however, was an existing contract in the performance of which the surety was interested because it was liable therefor. In the circumstances disclosed it evidently appeared to be to the interest of the surety to have the provision with respect to reserving part of the amount earned waived and likewise with respect to the time of performance. Having consented to these modifications at the instance of its principal, and the plaintiff having acted thereon manifestly to his prejudice, if the consent and waiver were now to be repudiated, the defendant is estopped from contending that these modifications with respect to performance discharge it from all liability. (*Thomson v. Poor*, 147 N. Y. 408; *Gallagher v. Nichols*, 60 id. 438; *Smith v. Wetmore*, 167 id. 234; *Blanchard v. Trim*, 38 id. 225; *Roberge v. Winne*, 144 id. 709; *Dodge v. Wellman*, 1 Abb. Ct. App. Dec. 512; *Klein v. Long*, 27 App. Div. 158; *New York Life Ins. Co. v. Casey*, 81 id. 92; *Brandt Sur.* [3d ed.] § 439; *Prairie St. Nat. Bank v. United States*, 164 U. S. 227.)

It follows that the judgment should be reversed and new trial granted, with costs to appellant to abide the event.

O'BRIEN, P. J., INGRAHAM, McLAUGHLIN and CLARKE, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event. Order filed.

ALEXANDER F. ROBERTSON and MARTHA G. DE BRULATOUR, as Trustees of a Trust Created under the Last Will of JOHN T. FARISH, Deceased, Appellants, Respondents, v. MARTHA G. DE BRULATOUR, Individually, and Others, Respondents, Appellants.

First Department, March 28, 1906.

**Testamentary trust — life beneficiary of the income and dividends of specific stock placed in trust is entitled to receive dividends declared thereon — distinction in this respect between trust of specific stock and trust of a fund of money — subscription rights accruing on such stock go to increase corpus of the trust — unnecessary to provide a sinking fund to provide against depreciation in value of specific securities — trustees receiving such specific stock entitled to one-half commissions — when life beneficiary entitled to act as trustee — when life beneficiary acting as trustee entitled to commissions.**

When a testator puts certain specific railroad stock and bonds, together with all interest thereon theretofore accrued or thereafter accruing, and every and all dividends which may be declared on said stock subsequent to the testator's death, in trust for the benefit of his wife for life, with a direction to the trustees to receive the income and profits thereof and apply the same to the use of said wife, with power in the trustees to sell and dispose of any or all of said stock and to invest and reinvest the proceeds in such securities as to them may seem advisable, and to apply the income and profits arising therefrom as aforesaid with remainder at the death of the wife to the heirs of the testator, the wife is entitled to receive dividends declared on said stock during the period of the trust, and such dividends are not to be considered as part of the principal.

There is a settled distinction between a case where specific securities consisting of stock and bonds are bequeathed to a trustee with a direction to pay the income and profits of such specific securities to a life beneficiary, and a case where a sum of money is bequeathed to trustees with directions to invest the same and pay the income of the amount invested to a beneficiary. In the latter case the trustees are bound, whatever the form of the investment, to preserve intact the capital of the trust, but where specific securities are put in trust with a direction that the income and profits thereof be paid to a beneficiary for life, with a bequest over at the termination of the life estate, the income or profits received from such securities belong to the life beneficiary and not merely the income of a specific fund equal in value to the securities at the time of the testator's death.

The profits or surplus which a corporation earns or realizes in the management of its business, and which is paid to stockholders by way of dividends, whether earned before or after the creation of the trust, is income or profits which go to the life beneficiary.

App. Div.]

First Department, March, 1906.

But under a bequest of the income of such specific stock the life beneficiary is not entitled to the proceeds of the sale of rights to subscribe to new capital stock issued by the corporation. Such right of subscription is not in the nature of a dividend or distribution of profits. It is a right which accrues to the owners of the stock as an incident to its ownership. Hence, such subscription rights go to increase the capital of the trust, and the proceeds of a sale of said rights is part of the capital of the trust.

When specific stock is put in trust as aforesaid, the trustees are not entitled to set aside a part of the income as a sinking fund to provide for any depreciation in the value of the securities. The beneficiary is entitled to all the income, even though the payment of all such income would reduce the selling value of the securities.

By virtue of the amendment to section 3820 of the Code of Civil Procedure, made by Laws of 1904, chapter 755, trustees to whom such specific securities are bequeathed in trust are entitled to one-half commissions, payable out of the corpus of the estate, for receiving the principal thereof. The words "All sums of principal," as used in said section as amended, apply as well to securities in bulk as to money received.

*It seems*, that though such trustees are empowered to sell such specific stock and reinvest the proceeds, this power would not entitle them to any additional compensation, the duty being incident to the proper performance of the duties of the trust.

X Although it is a general rule that a beneficiary of a trust cannot be at the same time a trustee, yet where duties devolve upon the trustee other than those relating merely to the performance of the trust for the benefit of the beneficiary, the beneficiary may act as trustee for others interested in the estate. Where there is an active duty imposed upon the trustee for the benefit of remaindermen, the life beneficiary can act as trustee, and under such circumstances the trustee is entitled to commissions, although a life beneficiary.

CROSS-APPEALS by the plaintiff, Alexander F. Robertson and another, as trustees, etc., under the last will of John T. Farish, deceased, and by the defendants, Martha G. de Brulatour, individually, and others, from portions of a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 18th day of May, 1905, upon the report of a referee.

*Henry De Forest Baldwin* for the defendant Martha G. de Brulatour.

*George F. Canfield*, for Thomas H. Somerville and others, as remaindermen.

*Edward T. McLaughlin*, guardian *ad litem*, for infant remaindermen.

INGRAHAM, J. :

This action was brought in 1903 by the trustees under the last will and testament of John T. Farish to have their accounts settled. The controverted questions upon this accounting related to dividends upon stocks bequeathed to the trustees in trust for the testator's widow and as to the commissions to which the trustees were entitled. The trust was created by the 6th clause of the will of John T. Farish, and is as follows :

"*Sixth.* I give and bequeath to Charles M. Fry, Alexander F. Robertson and my wife, Martha G. Farish, and the survivors and survivor of them and to the successor or successors of such survivor Twenty-five hundred (2,500) shares of the capital stock of the New York and Harlem Railroad Company, One thousand (1,000) shares of the capital stock of the New York Central and Hudson River Railroad Company (consolidated), and One thousand (1,000) shares of the capital stock of the Chicago, Rock Island and Pacific Railway Company, also Twenty thousand dollars (\$20,000) at the par value of the consolidated bonds of the Erie and Pittsburg Railroad Company, Fifty thousand dollars (\$50,000) at the par value of the consolidated bonds of the Chicago and Northwestern Railway Company, and Thirty thousand dollars (\$30,000) at the par value of the first mortgage bonds of the Louisiana and Missouri River Railroad Company, together with all interest accrued on said above described bonds at the time of my death and all interest accruing thereon thereafter, and also every and all dividends which may be declared on the above described stocks subsequent to my death, in trust nevertheless, to receive the income and profits thereof and apply the same to the use of my said wife, Martha G. Farish, during the term of her natural life, and I hereby authorize and empower my said trustees, if it shall seem advisable to them so to do, to sell and dispose of any or all of the aforesaid shares of stock and bonds, and to invest and reinvest the proceeds in such securities as to them may seem advisable, and to apply the income arising therefrom as above provided.

"Upon the death of my said wife I give and bequeath all of the above mentioned shares of stock and bonds, or the proceeds of such as shall have been previously sold, to such persons as would have inherited the same under the laws of the State of New York, if the

App. Div.]

First Department, March, 1906.

same were real estate and I had died intestate and unmarried, at the same time as my said wife and in such proportions as they would have inherited the same respectively."

The testator died, a resident of the city of New York, on the 13th day of May, 1891. He left him surviving his widow, but no children, his next of kin being a brother and sisters, all of whom are now dead. Those who are his present next of kin are the descendants of two sisters, who are parties to this action.

The first questions to be considered relate to a dividend declared on September 19, 1899, by the New York and Harlem Railroad Company which amounted to \$31,250; to a dividend of 100 shares of stock declared as a stock dividend upon the stock of the Chicago, Rock Island and Pacific Railway Company held by the trustees, and to the amount realized by the trustees for the sale of rights to subscribe for certain additional stock of the Chicago, Rock Island and Pacific Railway Company and the New York Central Railroad Company and the allowance of commissions.

Before discussing the question relating to these dividends, we will consider the intention of the testator relating to this trust as disclosed by the will. The testator, leaving a large estate, made provision for his wife. He gave her \$100,000 in cash, a stable and his horses, carriages, furniture and household articles, and created for her benefit this trust consisting of securities of the par value of \$425,000. This trust consisted of \$325,000 of stock of three railroad companies and \$100,000 of railroad bonds. These specific securities having been bequeathed to his trustees for the benefit of his wife, he also bequeathed to them "all interest accrued on said above described bonds at the time of my death and all interest accruing thereon thereafter, and also every and all dividends which may be declared on the above described stocks subsequent to my death." The bequest was in trust, "to receive the income and profits thereof and apply the same to the use of my said wife, Martha G. Farish, during the term of her natural life," with a power to the trustees to sell any or all of these securities, "and to invest and reinvest the proceeds in such securities as to them may seem advisable and to apply the income arising therefrom as above provided," viz., to the use of his wife during the term of her natural life. Having thus disposed of what should accrue upon these

securities by way of income and profits during the life of his wife, upon the death of his wife he bequeathed "all of the above mentioned shares of stock and bonds, or the proceeds of such as shall have been previously sold, to such persons as would have inherited the same under the laws of the State of New York, if the same were real estate and I had died intestate and unmarried, at the same time as my said wife and in such proportions as they would have inherited the same respectively."

It would seem that the testator intended by this bequest to dispose of all these securities, including any income that was received during the continuance of the trust and what would be left of the trust upon the death of his wife. He disposed of the "income and profits" of the securities received during the life of his wife by directing that they should be applied to her use. What he directed should pass upon the death of his wife was "the above mentioned shares of stock and bonds or the proceeds of such as shall have been previously sold" — an indication, it seems to me, that what the testator understood would remain undisposed of at the death of his wife were these specific shares of stock as they then stood, or the proceeds remaining in the hands of the trustees in the event that such shares had been sold by the trustees under the power given to them. There was no expressed intention that any dividends or interest that had been received by the trustees upon the shares of stock or bonds should be held by the trustees and turned over to those entitled to the remainder. This provision for the wife was to be in lien and bar of all dower and right of dower and of any other claim or interest whatsoever that she might have in his estate, real or personal, or any part thereof. There is certainly in this will no indication that it was the intent of the testator that there should be anything deducted from the sums received by the trustees in the way of dividends, income or profits to be accumulated by them to prevent any deterioration or depreciation in the value of the stock and bonds during the continuance of the trust. The primary object was to make provision for his wife during her life, and, subject to that provision, what was left at her death was to be disposed of as indicated. There was bequeathed by the testator to these trustees, as a part of the trust property, 2,500 shares of the capital stock of the New York and Harlem Railroad Company.



App. Div.]

First Department, March, 1906.

On September 19, 1899, the directors of the New York and Harlem Railroad Company passed the following resolution: "Whereas, it appears from the Treasurer's report that the Company's cash surplus now amounts to upwards of \$2,500,000 over and above all claims and obligations, existing and contingent, and that the same is now available for distribution among the stockholders. It is further resolved that the sum of \$2,500,000 of the said surplus be distributed at the rate of \$12.50 per share to all stockholders of record at the close of business on the 23d day of September, 1899, and that the Treasurer be and he is hereby authorized and directed to make such payment on the 2nd day of October next." The amount of this dividend was \$31,250, which was received by the trustees and retained by them, and the first question presented is whether this amount is to be retained by the trustees as capital of the trust, or whether it belongs to the widow as beneficiary for life.

The New York and Harlem Railroad Company was the owner of a steam railroad, and was also the owner of a street railroad, in the city of New York. Long prior to the death of the testator the steam railroad had been leased to the New York Central and Hudson River Railroad Company, which agreed to pay the New York and Harlem Railroad Company as rent eight per cent per annum upon its stock. At the death of the testator the New York and Harlem Railroad Company operated its line of street railroad, and the profits of that line were divided among its stockholders. The company also owned several parcels of real estate in the city of New York. After the death of the testator the New York and Harlem Railroad Company leased its city line of railroad to the Metropolitan Street Railway Company. There was evidence that after this lease certain real estate that belonged to the Harlem Railroad Company, and which was not needed in its business, was sold, and it would appear that the particular money used in paying this dividend was partly the proceeds of the sale of this real estate. The amount distributed as a dividend, however, was surplus which represented the accumulation of profits of the company in the past, either from its operation or from the increase in the value of its real estate, and this distribution was simply a distribution of surplus profits of the company realized from its operations, and which were

not needed in the conduct of the company's business. The profits as such were realized when the company's real estate was sold. It then became money in its possession as surplus profits, and was distributed by the company among its stockholders as such. The trustees, therefore, received from the New York and Harlem Railroad Company a dividend of twelve dollars and fifty cents a share as a distribution by the company of its surplus. The testator had directed the trustees to receive the income and profits of these securities and to apply the same to the use of his wife during her life.

There is nothing in the evidence to indicate that this dividend was a distribution of the capital of the railroad company, as the witnesses all testify, and the referee finds, that the capital of the company was intact after the payment of the dividends, and that the property of the company was largely in excess of its indebtedness and capital stock. Of late years this question has been much discussed, and there is now a settled distinction between a case where specific securities consisting of stock and bonds are bequeathed to a trustee, with a direction to pay the income and profits of these specific securities to a life beneficiary, and where a sum of money is bequeathed to trustees, with directions to invest that sum of money and to pay the income of the amount so bequeathed and invested to a beneficiary. In the latter case the trustees are bound, whatever the form of the investment may be, to preserve intact the capital of the trust bequeathed to them; and while, if in case of unexpected decline in the value of the securities, or for any other reason, the capital becomes impaired, where the trustees have acted in good faith and observed the rules of law in carrying out the trust, they are not required to make up such deficiency from the income, still, when they purchase securities at a high premium, they are justified in applying a part of the income or dividends to prevent a depreciation in the value of the securities where such interest or dividends represent in part a premium which they have paid; but a different situation is presented where a person bequeaths to trustees specific securities and directs that the income and profits of such securities be paid to a beneficiary for life, with a bequest over of such securities at the termination of the life estate. In the latter case it is the income or profits that the trustees received from the securities to

App. Div.]

First Department, March, 1906.

which the life beneficiary is entitled, not the income of a specific fund which represents the value of the securities at the time of the testator's death, and I think it is now established that when the profits or surplus of a corporation which it has earned or realized in the management of its business are paid to its stockholders by way of dividends, whether such profits or surplus has been earned before or after the creation of the trust, so long as the amount that is actually distributed is actual surplus earned, or income or profits made by the corporation in its business and distributed as such, it is income or profits which go to the life tenant.

The first case to which I will call attention is *Matter of Kernochan* (104 N. Y. 618). In that case the trustees were authorized to receive the "rents, interest and income" of property given to them in trust and to apply the net amount of such rents, interest and income to the use of the widow during her life, and after her death to divide his estate among his surviving daughters and the issue, if any, of such as may have died. Among the personal property left to the trustees was 5,000 shares of the capital stock of the Panama Railroad Company. It seems that this stock was, subsequent to the death of the testator, sold to the Panama Canal Company at something over \$265 per share. As a part of the agreement of sale it was provided that "all earnings of the railroad company to and including June, 1881, and all moneys and other effects not by that agreement to be left with the railroad company, should be transferred by the railroad company to a trustee for the benefit of all the existing stockholders and belong to and be divided among the shareholders who are such at the time of the declaration of such dividend or transfer of the railroad company." It appeared that these assets were subsequently sold to a syndicate for an amount which equalled twenty-four dollars and twenty-six cents on each share of the capital stock of the company, and on June 30, 1881, a dividend of twenty-four dollars and twenty-six cents on each share of the capital stock of the company was declared. It also appeared that the assets which formed the consideration of the payment by the syndicate were accumulated net earnings, represented by cash or securities calling for cash. The remaindermen objected, that this sum should not be credited to the income, but should have been held as capital. The referee found that the

amount after the death of the testator was income, but that earned before the death of the testator was principal. Judge DANFORTH, delivering the opinion of the court, said: "I find nothing in the will which indicates that the testator intended any such investigation or division, or that any other than the ordinary rule which gives cash dividends declared from accumulated earnings or profits to the life tenant should be applied. \* \* \* From the shares in question no income could accrue, no profits arise to the holder until ascertained and declared by the company and allotted to the shareholder, and that act should be deemed to have been in the mind of the testator and not the earnings or profits as ascertained by a third person or a court upon an investigation of the business and affairs of the company, either upon an inspection of their books or otherwise." Then, after examining the authorities, the learned judge continued: "In this case no portion of the earnings which entered into the dividend had been capitalized by the company and, therefore, the inquiry when the profits were earned, out of which it was to be paid, was immaterial. It is not claimed that the declaration of the dividend, as dividend from profits was *ultra vires*, and whenever earned they were not profits until the directors so declared," and quoting with approval from *Sproule v. Bouch* (L. R. 29 Ch. Div. 635) as follows: "The general principle applicable to the first of these inquiries may, in our opinion, be thus stated: When a testator or settlor directs or permits the subject of his disposition to remain as shares or stock in a company which has the power either of distributing its profits as dividend, or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under him, the testator or settlor, in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital. In a word, what the company says is income, shall be income, and what it says is capital, shall be capital."

The next case to which I wish to call attention is *McLouth v. Hunt* (154 N. Y. 179). In that case the estate of the testatrix was bequeathed to the trustees with a provision that her executors pay

App. Div.]

First Department, March, 1906.

over to the use and benefit of each of her grandsons respectively from and after the arrival at age of her said grandsons respectively, the full income of one of the said parts. A portion of the estate which the executors received in trust was 254 shares of the capital stock of the Western Union Telegraph Company upon which the trustees received a stock dividend of ten per cent represented by certificates issued to them for  $25\frac{4}{10}$  additional shares. This dividend was declared from the surplus earnings of the corporation, and it was claimed by the trustees that these stock dividends upon the Western Union stock was not income payable to the life tenants, but an accession to the capital which went to the remaindermen. The court held that what the corporation really did was to issue to the shareholders its own obligations in the form of stock certificates against the accumulated earnings which it had on hand, and these certificates having a market value could readily be converted into money by the shareholders, so that the transaction was in substance a distribution of profits, and that in that case the stock dividend represented income and properly belonged to the life tenant.

The next case is *Matter of Rogers* (161 N. Y. 108). In that case the testator created three separate trusts for the benefit of his children during their lives, with remainders to their issues. A part of the principal devised to the trustees were shares of the capital stock of the Rogers Locomotive and Machine Works. The testator died in 1868. The capital stock of the corporation was then \$300,000, and this stock was appraised at \$125 per share. The corporation continued business until 1893, paying dividends each year. In 1893 it sold its plant for the sum of \$2,750,000, to be paid in stock of a new corporation known as the Rogers Locomotive Company, whose capital stock was \$3,000,000. The stock of the new company obtained from the sale of the plant of the old company was divided among the stockholders of the old company in proportion of ten shares of new stock to one share of old stock. After this sale the old company remained in possession of other property which it had accumulated, consisting of capital on hand, bills receivable, real estate, government bonds and stock of other companies amounting in round numbers to \$3,000,000. This property the officers of the corporation converted into money and distributed it among its

stockholders. The question arose as to whom this belonged, whether to the life tenants or to the remaindermen. The court said: "As we have seen, the surrogate held that all that was received upon the sale of the plant should be retained by the trustees as capital, and this included that which had been paid out for raw material. He also held that the first cash dividend made on the liquidation of \$100 per share should also be retained by them as capital;" and that the balance of the \$3,000,000 that was divided among the stockholders of the old company was income to go to the life tenant. This determination was affirmed upon the ground that this \$100 per share represented what was reserved for working capital by the new company, and was, therefore, capital, and that the balance was profits which being properly distributed as such, went to the life tenants. Here was property representing accumulated surplus which was distributed upon the winding up of a corporation; yet where it was distributed as surplus profits and not as a part of the plant or working capital of the company, it was held to go to the life tenants, although apparently it was realized from real estate, government bonds and stock in railroad corporations, cash on hand and bills receivable.

The next case is *Lowry v. Farmers' Loan & Trust Co.* (172 N. Y. 137). In that case the testator died in 1895. He gave one-fourth of his residuary estate to trustees to apply the rents, issues and profits thereof to the use of the testator's wife until her death or remarriage, in either of which events the trust property should go to increase the portion of the estate held in trust for the benefit of his children. As a part of this trust there was stock of the Pullman Palace Car Company, eight shares of which formed a part of the trust estate held for the plaintiff. That company declared a dividend of fifty per cent, payable in certificates of stock at par value. This dividend was declared and obtained from the accumulations of net surplus as the same appeared in the accounts of the company, and it was held that such a transaction although in the form of an issue of stock certificates, was a distribution of the profits, and what the stockholders got represented income and was income. The rule is that "where a corporation has declared a dividend upon its capital stock, payable in new stock certificates, if it is based upon an accumulation of earnings, or profits, by their dis-

App. Div.]

First Department, March, 1906.

tribution in that manner, the stockholders receive the representative of income and not of capital;" that "while the corporate action may not be, necessarily, conclusive upon the court, with respect to the question, if it is based upon facts, and is not purely arbitrary, it will, and should, be controlling." The court then goes on to say: "It is true enough, as the appellant argues, that the testator, at the time of his death, owned the right to share in the assets of the corporation, proportionately to the amount of stock which he held; but it does not, therefore, follow that dividends, thereafter made from the accumulations of earnings, must be regarded and treated as additions to the capital of the trust estate. All stockholders are interested in the operation of the property of a corporation and their shares of stock represent individual interests in the corporate enterprise, in its capital, as in its net earnings; but the corporation itself has the legal title to all the properties and holds them for their benefit. They have a right to dividends only as the corporate agents, in the exercise of their discretion, may declare them. \* \* \* The declaration of a dividend by a corporation in active operation is the appropriation of a portion of the assets, which represented the net earnings of the corporation, for the use of the stockholders, and *pro tanto*, the assets are diminished. The stock no longer represents them. The capital is unchanged, but the value in the market of the shares may be affected by the diminution in the amount of the corporate assets. That the value of the shares of stock has been lessened by a dividend is a fact of no relevancy in determining the question of whether the dividend is to be regarded as income to the life tenant or as capital for the remainderman. That question will be determined by the origin of the dividend. In this case a fund had been created by an accumulation of the net earnings of the corporation and it remained a part of the general assets, until, in the judgment of the directors, the time came when it was proper and prudent to distribute it among the stockholders. That which the directors of the corporation distribute among its stockholders, without intrenching upon capital, must be comprehended within the term 'profits,' and we should assume that the testator intended that what might be paid in that way should belong to the beneficiary. There is no question of diminishing the capital, nor of increasing the capital for any cor-

porate purpose or need. It was simply a mode of distributing the profits earned by the employment of the capital."

The case of *Chester v. Buffalo Car Mfg. Co.* (70 App. Div. 443) is entirely in line with these decisions, for there the court said: "While it is subject to modification and variation, the natural and fundamental idea of life income payable under a will is of that current income which accrues and becomes payable from time to time during the life tenancy upon a principal fixed as of the time when the trust took effect and remaining substantially unchanged."

The fact that the particular money that was used in the payment of this dividend was from the sale of real estate seems to me entirely unimportant. The company had been in operation for many years. It had from time to time moved its depot as its business required. It had invested money in the real estate necessary for its new depot, and when the old real estate became unnecessary it was sold and the proceeds of such sale became money of the company to be distributed if it was not needed for the business of the company. It represented surplus profits just as much as if the money invested in the new real estate had been kept in its possession and this real estate exchanged for the new real estate required for the new depot. In this case, as in *Lowry v. Farmers' Loan & Trust Co.* (*supra*), "a fund had been created by an accumulation of the net earnings of the corporation, and it remained a part of the general assets until, in the judgment of the directors, the time came when it was proper and prudent to distribute it among the stockholders," and "that which the directors of the corporation distribute among its stockholders, without intrenching upon capital, must be comprehended within the term 'profits,' and we should assume that the testator intended that what might be paid in that way should belong to the beneficiary." It follows that the learned referee was wrong in holding that this dividend was a part of the capital, and that the judgment should be modified by directing it to be paid to the life tenant.

The second question presented is as to the 100 shares of the capital stock of the Chicago, Rock Island and Pacific Railway Company, and as to certain cash dividends paid upon the stock held by the trustees. The same principle that we have before discussed in regard to the dividend of the Harlem Railroad Company



App. Div.]

First Department, March, 1906.

determines this question, and the referee was clearly right in holding that these dividends belonged to the life tenant.

The next question is as to the proceeds of the sale of rights to subscribe to stock in the Chicago, Rock Island and Pacific Railway Company and the New York Central Railroad Company. We think the referee was right in respect to this question, and that the amount realized was a part of the capital of the estate. When the corporation gave to the existing stockholders a right to subscribe to its capital stock at a price fixed, there was nothing in this right of the nature of a dividend or distribution of profits. It was a right which accrued to the owners of the stock as an incident to its ownership. If the owner of the stock had accepted the option and had subscribed to the stock, the stock so subscribed and paid for out of the capital of the trust would be clearly a part of the trust property, and any increase in the value of that stock after its subscription would accrue to the capital of the trust. The trustees not being in a position to make these subscriptions, sold the right to subscribe, and the proceeds realized from a sale of this right was a part of the capital of the trust. This question is presented in *Matter of Kernochan* (104 N. Y. 618), and that case is controlling upon this point.

The next question is as to the necessity of establishing a sinking fund to provide for any depreciation in the value of the securities which form a part of the trust estate. This question is also settled by the authorities that we have before considered. It is now settled that where specific securities are devised, with a direction to pay the income and interest of those securities, the beneficiary is entitled to all the interest, even though the payment of all the interest would tend to reduce the selling value of the securities. (*McLouth v. Hunt, supra*; *Matter of Rogers*, 22 App. Div. 428.)

The only remaining question is as to the right of the trustees to one-half commissions for receiving the entire trust property. I think we must treat this question without reference to the fact that the executors and trustees were the same persons. Whether or not the executors were entitled to commissions is not before us. The will bequeathed certain property to the trustees in trust, and it has been received by them and is now held by them under the provisions of the will; and these trustees are entitled to such a com-

mission as the law allows to trustees who have received bequests of personal property in trust, to hold it during the life of the beneficiaries and to pay the income and proceeds thereof during her life to the beneficiary, and upon her death to deliver the securities over to the remaindermen. Upon this appeal we are not concerned with the right to commissions upon the income which was received by the trustees and paid to the life tenant, as by an express stipulation that question has been arranged by private agreement between the life tenants and the trustees.

Section 2802 of the Code of Civil Procedure provides for a voluntary accounting before a surrogate by a trustee created by a last will and testament. It provides that a surrogate before whom such an accounting may be had "shall allow to the trustee or trustees the same compensation for his or their services by way of commission, as are allowed by law to executors and administrators, besides their just and reasonable expenses therein." By section 2730 of the Code the commissions of an executor or administrator are fixed as a percentage "for receiving and paying out all sums of money." The question as to trustees' commissions was presented to the Court of Appeals in *Phoenix v. Livingston* (101 N. Y. 451), where the main portion of the trust property consisted of real estate. In discussing whether or not the trustees were entitled to commissions upon the real estate held by them it is said: "Sums received and paid out are made the basis of computation. It has, nevertheless, been held that securities received by an executor, and by him turned over to the parties entitled, might be treated as money received and paid out for the purpose of computing commissions. This was itself an extension of the authority of the statute, justified by the consideration that what was accepted as money by the parties interested might well be treated as such for purposes of compensation. But we are asked now to take a step further and give a new extension to the act, which does violence to its language, and makes land, in no just sense received or transferred, constructively money. \* \* \* They were authorized to sell and to rent the real estate. Upon all sums of money thus realized and passing through their hands they were entitled to commissions; but the unsold lands, at the close of the trust, passed to the possession of the remaindermen, not through any title derived from the trustees, but

App. Div.]

First Department, March, 1906.

by force of the original devise. The trustees transferred no land, but simply refrained from exercising their power of converting it into money. And so they not only never paid it out even constructively by any grant or conveyance, but never even received the absolute fee which all the time was a vested interest in remainder. Their estate was simply commensurate with their trust, bounded as to the duration by the terms of the trust, and as to the unsold lands never equalling in value that of the fee. We must, therefore, adhere to the statutory basis of computation and decline to advance further in a construction which steadily departs from a plain and unambiguous enactment having a definite purpose and meaning."

In *McAlpine v. Potter* (126 N. Y. 285), which seems to have been decided under section 2802 of the Code of Civil Procedure, as it now exists, and section 58 of title 3 of chapter 6 of part 2 of the Revised Statutes (2 R. S. 93, § 58, as amd. by Laws of 1863, chap. 362, § 8, and partly repealed by Laws of 1880, chap. 245, § 1, subd. 2, ¶ 3), the will gave to the trustees the remainder of property to hold the same in trust, with a power to lease, sell, assign, transfer and convey the same, collect, invest and reinvest the proceeds thereof as they should deem best for the interests of the estate. From this income there was to be paid an annuity of \$200 to a beneficiary named during her life, and the balance of the income was divided into six parts, one part to be paid to a beneficiary named during her life. In considering this question the court say: "A further question is raised over the allowance to the executors of half commissions for receiving the funds of the estate. The law allows a specific rate for 'receiving and paying out all sums of money.' The statute indicates no division of the commissions which should apportion one-half to the receiving and the balance to the paying out, though the courts have allowed it in proper cases. But the allowance here was premature. The bulk of the estate came to the executors already invested and in the form of securities which have not been turned into money. No law justifies the allowance of one-half commissions upon their estimated value in advance of their conversion into money or its equivalent. It was proper enough to allow one-half commissions upon all sums of money received, but until the securities become

sums of money, either by conversion into cash, or by their acceptance as cash by those entitled, the allowance is premature. The computation of the commissions at an earlier period pays for services before they are rendered and rests upon estimates of value which may be very different from the sums of money actually received and paid out. A time will come when the allowance may be entirely just and proper. That will be when the securities have been turned into money for the purpose of payment, or have been accepted by the legatees as cash without being converted. The allowance upon the securities was premature and without a statutory basis and must be reversed." That case was followed by the General Term in the first department, affirming the report of a referee partly upon his opinion. (*Linsly v. Bogert*, 87 Hun, 137; 67 N. Y. St. Repr. 653; *affd.*, 152 N. Y. 646, on opinion below.) The opinion of the referee is reported in 67 New York State Reporter, 654.

After sections 2730 and 2802 of the Code of Civil Procedure were both in force, this question was again presented in *Matter of Johnson* (57 App. Div. 494). In that case the testator gave to his executors a certain sum of money, the income to be paid to his daughter during her life and the court said: "The decree of the Surrogate's Court awarded to the trustees commissions for receiving the *corpus* of the trust estate. In this we find no error. Commissions are usually awarded on the settlement of the accounts of executors or trustees. \* \* \* Where the latter are managing an estate which must continue for years, it is not expected that before they can receive any compensation for their services they must wait the termination of the trust. In this case they had performed the functions of trustees for years. They had managed the trust property with thrift and good judgment. It was well invested and was approved on an accounting by the surrogate, and it was their right to be paid for receiving this property. The commissions to be awarded upon distributing the principal of the fund must be deferred until the moneys are paid over, but the compensation for receiving is a distinctive one and has been earned. Again, it is urged that the trustees are not entitled to commissions on the securities which came from the testator and which they have not converted into cash, but have retained, as

App. Div.]

First Department, March, 1906.

they were first-class securities. The whole scope of the trusteeship is to keep the money invested in securities of this kind in order to bear an income, and the executors might properly be condemned if they had parted with safe mortgage investments which the testator had carefully made," and as a result the court held that each trustee was entitled to "one-half of the commissions allowed by said section \* for 'receiving and paying out' and which is to be computed on the entire principal which came into their custody as trustees, keeping in view, however, the separate trust funds." There was an appeal in this case to the Court of Appeals (170 N. Y. 139), and in considering this question it was said: "While in this case the same trustees were appointed for each of the trusts, that does not affect the meaning of the statute which would be the same if different trustees had been selected for each trust," and it was held that each of the respondents as trustees was not entitled to full commissions, but only to one-third thereof, but affirmed the judgment allowing the trustees commissions upon the securities which had come into their hands, but which had not been sold by them, although the point was taken by the appellants in their brief that awarding to the trustees commissions in the proceeding was error, citing *McLouth v. Hunt* (*supra*).

In *Matter of Notman* (103 App. Div. 520) we held that a committee of an incompetent was entitled to one-half commissions for receiving the securities of which the estate of which they were a committee consisted, although they had not sold or disposed of those securities, but retained them in the condition in which they were at the time they received them. After considering the authorities the court said: "We are of opinion, therefore, that the committee of the property of an incompetent person is to be compensated for receiving and holding property which it does not become his duty to convert into cash, and that such compensation is not to be made upon the theory that these are *extra* services in addition to those which would be required to be performed by an executor or administrator and for which the court may make a special allowance, but upon the theory that they correspond within the fair intent and meaning of section 2338 of the Code of Civil Procedure with

---

\* Code Civ. Proc. § 2730. — [REP.]

the services of an executor or administrator in converting property into cash. It follows that the committee should have been allowed one-half commissions."

After the rule had thus been settled the Legislature, by chapter 755 of the Laws of 1904, amended section 3320 of the Code by adding the following provision: "A trustee of an express trust is entitled \* \* \* as compensation for services as such, over and above expenses, to commissions as follows: For receiving and paying out all sums of principal not exceeding one thousand dollars, at the rate of five per centum. For receiving and paying out any additional sums of principal not exceeding ten thousand dollars, at the rate of two and one-half per centum. For receiving and paying out all sums of principal above eleven thousand dollars, at the rate of one per centum. And for receiving and paying out income in each year, at the like rates. \* \* \* If the value of the principal of the trust estate or fund equals or exceeds one hundred thousand dollars, each such trustee is entitled to the full commission on principal and on income for each year to which a sole trustee is entitled," etc. And in considering this provision of the Code we should give weight to the change in phraseology between this provision and the section of the Code which previously fixed the commissions. In section 2730 of the Code, commissions are fixed as a percentage for receiving and paying out "sums of money;" and in *Phoenix v. Livingston* and *McAlpine v. Potter* (*supra*) it was finally settled that where specific property was received by a trustee, an allowance for commissions is premature until the property has been in some way turned into money or accepted by the remaindermen as money. Thus, in the latter case, it is said: "A time will come when the allowance may be entirely just and proper. That will be when the securities have been turned into money for the purpose of payment, or have been accepted by the legatees as cash without being converted." With this construction of section 2730 of the Code, the Legislature passed the act of 1904 which in express terms awarded to trustees of express trusts commissions, and instead of using the language which had before been used in relation to executors' commissions and which the Court of Appeals have construed so as to award commissions only when the property had been received and turned into money, or accepted by the residuary legatee as money, it

App. Div.]

First Department, March, 1906.

provided that a trustee of an express trust is entitled, as compensation for services as such, over and above expenses, to commissions as follows: "For receiving and paying out all sums of principal," etc. "All sums of principal" would apply as well to securities in bulk as it would to money received. The principal of the trust consists of the securities in which the trust is invested, and whether they are turned over to the trustees in specie or money, it seems to me that in either case the trustees have received the principal of the estate, and as the section gives to a trustee of an express trust commissions based upon the sums of principal, it would seem that he is entitled to one-half commissions for receiving the securities in which the estate is to remain invested immediately upon their receipt.

Considering the services that the trustees render for which they are entitled to this commission, I think this provision a reasonable one. When the securities are turned over to the trustees, they must see that they are properly transferred so as to protect the estate and that arrangements are definitely made for the continuance of the trust. The trust then continues without further action by the trustees so far as these securities are concerned, the trustees merely receiving in the meantime the interest and turning it over to those entitled to it until the termination of the trust, when the securities have to be transferred to those entitled to them. The mere fact that a reinvestment may be necessary during the continuance of the trust, the securities being paid off, or of its being necessary to sell them and reinvest the proceeds, would not, of course, entitle the trustees to any additional compensation, that being incident to the proper performance of the duties of the trust. I think, therefore, that in view of what has been said in the cases before cited, under section 3320 of the Code, as amended by chapter 755 of the Laws of 1904, where specific personal property has been given to a trustee in trust, to receive the rents and profits for the benefit of a life beneficiary, and such securities are received and held by the trustees, the trustees are entitled to one-half commissions for receiving it immediately upon the receipt of the property, out of the corpus of the estate.

X The remaining question presented is, whether the life beneficiary can act as trustee of this trust so as to be entitled to commissions. The general rule is undisputed that a beneficiary of a trust cannot

be at the same time a trustee; but it is also recognized that where other trust duties are devolved upon trustees than those which merely relate to the performance of trusts for the benefit of a beneficiary, the beneficiary can act as trustee for the others interested in the estate. This trust is personal property. The trustees are bound to hold it and preserve it for the benefit of those to whom it goes at the termination of the trust. There is thus an active duty imposed upon the trustees for the benefit of the remaindermen, and for their benefit the life beneficiary can act as trustee. Nor do I think that the question of the right of the life beneficiary to act as trustee is before us on this appeal. It appears that by the decree of the surrogate she was recognized as a trustee, and the trust property was turned over to her with her cotrustees, and she has performed the duties required of her as trustee. She would clearly be responsible to the remaindermen for any neglect in the performance of her duties as trustee, and is entitled to the compensation allowed for the performance of such duties.

I think, therefore, that the life beneficiary is entitled to act as trustee for the benefit of the remaindermen and, as such, is charged with an active duty of receiving and preserving the trust property and is entitled to commissions as trustee.

The views before expressed will require a modification of this judgment, and the judgment is so modified, and as modified affirmed, with costs to all parties payable out of the principal of the trust.

O'BRIEN, P. J., PATTERSON, LAUGHLIN and CLARKE, JJ., concurred.

Judgment modified as directed in opinion, and as modified, affirmed, with costs to all parties payable out of the principal of the estate. Settle order on notice.



# CASES REPORTED WITH BRIEF SYLLABI

AND

## DECISIONS HANDED DOWN WITHOUT OPINION.

---

### FOURTH DEPARTMENT, JANUARY, 1906.

Minnie Cholet, as Administratrix, etc., of Henry Cholet, Deceased, Respondent,  
v. The City of Syracuse, Appellant.

*Negligence — death of employee by falling down elevator shaft — elevator moved from position in which it was left by intestate — insufficient light — contributory negligence.*

Judgment and order reversed and new trial ordered, with costs to the appellant to abide event upon questions of law only, the facts having been examined and no error found therein. Held, that as matter of law the evidence failed to establish actionable negligence on the part of defendant or freedom from contributory negligence on the part of the deceased. All concurred, except Spring and Hiscock, JJ., who dissented in an opinion by Hiscock, J.

Hiscock, J. (dissenting): I dissent. This action was brought to recover damages for the death of plaintiff's intestate and husband alleged to have been caused by the negligence of the defendant. Said intestate was found dead at the bottom of an elevator shaft in the city hall owned and occupied by the defendant. Nobody saw the accident. It is claimed by the plaintiff that while employed by the defendant for the purpose of repairing the elevator running in said shaft he attempted to enter said elevator and that the latter, without his knowledge, having been moved from the floor where he had left it, he was precipitated into the shaft and killed. Under her notice of claim and under the instructions given by the learned trial justice to the jury, the plaintiff is limited to the sole complaint that defendant was negligent in not furnishing such sufficient light in and around the elevator and elevator shaft as would have enabled intestate to discover that the elevator had been moved. While the evidence is meagre at certain points, I still think that it furnished a sufficient basis to permit and sustain the verdict of the jury and that the judgment should be affirmed. The jury were entitled amongst others to find the following facts as existing at and before the time of the accident: The defendant maintained a building known as its city hall which in part was occupied by various municipal offices and departments. This building was three or more stories in height. Its length ran in a generally northerly and southerly direction. The basement floor, with which we are especially concerned, was traversed in its center from north to south by a long hall. This hall was intersected by another one running from Market street upon the easterly side to Montgomery street upon the westerly side. The elevator shaft in question was located a few feet from the southeasterly corner of this intersection. In this shaft moved an elevator whose construction requires no particular attention, and in front of the elevator opening upon each floor was a grill iron work and sliding door with a catch which, when in order, could not be opened from the outside of the shaft except with a key. Three lights were located in the long hall above mentioned, one at each end and one at the intersection formed by the side hall. These lights were in the ceiling, and in each case consisted of a cluster of three incandescent lights inclosed in a large clouded or frosted globe fifteen inches in diameter and eleven feet and six inches from the floor. The hall received no daylight except a small amount which came in from the side entrances above mentioned, and both of which were a good many feet from the elevator shaft.

In accordance with instructions given by those in authority the lights at the respective ends of the hall were not kept burning, and the light in the elevator was extinguished when the latter was not in use, and at the time of the accident had been so extinguished. It was difficult for a person accustomed thereto to see whether the elevator was or was not at this floor, the only method, as stated by certain witnesses, being to catch a glimpse of or reflection from some glasses around the top of the elevator car. "It was dim there; it was dimly lighted." The latch upon the door leading into the elevator shaft, at least upon the floor in question, for a considerable time had been so out of repair that it could be worked and the door opened from the outside without a key, and likewise, for a considerable time, with the knowledge of the city officials in charge, people in and about the city hall had been accustomed to so work said latch without a key, open the door to and use the elevator when the same had been left by the boy in charge thereof and was not supposed to be in use. Intestate's main and regular employment was in the water department of the defendant, which was located in a building several blocks distant from the city hall. But he was a machinist and was specially employed to look after repairs to the elevators at the city hall, coming there for that purpose each morning from seven to eight, and upon a few occasions at other hours during the day. These duties included taking charge of the elevators and keeping them in repair, oiling them, etc., but nothing was said to him about the doors already mentioned. He had been thus engaged for a year and a half before the accident, but was not at the building or in and around the elevators during the day after eight o'clock in the morning unless specially sent for. Upon the day in question, there being trouble with the elevator where the accident happened, the boy in charge thereof, in accordance with directions of a superior, went after intestate for the purpose of having him make repairs. The latter came to the city hall, but shortly thereafter went back to the water office, where were necessary tools and supplies, and then again almost immediately returned to the city hall. After his last return he was running the elevator when a witness named McKeever met him at the third floor of the building and rode down in the elevator with him to the basement floor. The elevator was then still out of repair. The deceased, having closed and fastened the door leading into the shaft, with McKeever, went to a storeroom at the south end of the long hall already mentioned upon the basement floor, to find some necessary article. McKeever left the deceased in that room, passed through the hall by the elevator and out of the building by the side Market street entrance already mentioned. As he went out of the building some person, whether an employee of the city or not does not appear, came out of an adjoining room, opened the elevator door and set the elevator in motion for an upper story, the elevator door being closed as before. As this witness was in the middle of Market street, only about fifty feet distant from the elevator, Sparks, who had charge of the elevator, was coming across from the opposite side of the street to enter the city hall pursuant to his agreement with intestate, to assist in repairing the elevator. Sparks went directly to the elevator and found the elevator door wide open, the elevator itself being upon the floor above. He called loudly down the elevator shaft to Cholet, looked out and around the Montgomery street entrance and went through the building from the cellar to the third floor, calling loudly for intestate and making inquiry for him, but did not obtain any response or find him. This was in the afternoon, and Sparks soon thereafter left for the day, and, so far as appears, no further effort was made to find the intestate or which might naturally have led to the discovery of his body. The next morning at eight o'clock two of intestate's daughters were at the city hall looking for their father and soon thereafter a search was made which resulted in discovering the body at the bottom of the shaft, face downward, head northeast, with the neck broken and the body cold. The inferences which the jury evidently drew from these facts were that after Cholet came from the room where he was with the witness McKeever looking for paper he returned to the elevator which he was engaged in repairing; that he opened the door expecting to find and enter the elevator where he left it; that owing to the defects in the latch and the custom which people had of entering and using the elevator when not managed by the boy in charge thereof, said elevator had been moved from the place where it was left; that as a result of the darkness Cholet did not discover this and stepped into the open shaft, falling and receiving injuries which caused his death. It is strenuously urged by the learned counsel for the appellant that

App. Div.]

Fourth Department, January, 1906.

these are not legal or legitimate inferences, but are simply speculations unsupported by any sufficient proof; that other speculations might as well be adopted, as, for instance, that the deceased opened the door, found the elevator gone, reached for the rope to pull it back and lost his balance, falling into the well. As must be conceded, the evidence is not abundant or direct by which it may be demonstrated that the accident occurred in the manner claimed by the plaintiff. But that is a condition which is liable to confront the court in the decision of every case where an accident has occurred without eye witnesses, and it is well settled that in such a case plaintiff may establish his cause of action by proof of surrounding facts and circumstances though they appear somewhat remote and inconclusive, provided only they authorize the necessary inferences. Applying such rule to this case it seems to me that the jury were permitted to find as they did upon the evidence which was adduced. The intestate had been called specially to repair this elevator. He had already entered the elevator for the purpose of performing this duty and had brought it to the basement floor where he had left it stationary and with the door locked for the temporary purpose of procuring some supply and manifestly with the intention, in accordance with the duty and instructions which had been imposed upon him, of returning again to the elevator. That was his only duty in the building and he was never afterwards seen or heard of anywhere except at the elevator shaft. The natural thing for him to do was to return, open the door and step into the elevator car where he had left it. And the open door which Sparks discovered a few moments afterwards, and the subsequent discovery of intestate's body at the bottom of the shaft, warrant and sustain the theory that he did open the door and so attempt to enter the elevator in accordance with his employment, and that owing to the movement of the elevator by some unauthorized person away from the floor he met with the accident. If the hall or the elevator had been reasonably well lighted he would have discovered that the car was not there and the accident would have been avoided. The lack of light was attributable to the defendant and its officers. It was chargeable with knowledge of the fact that the catch was defective, so that the door could be opened without a key, and that people were accustomed to so open it and use the elevator without authority. It knew these things when it summoned the intestate and placed him at work upon and around the elevator and shaft. While there was some evidence upon the part of some of the defendant's employees that the intestate knew of these things, it was still permissible for the jury, under the instructions of the trial judge, to find that he did not know of them. If he did not know of them, then, in my opinion, the jury had a right to say that the defendant, knowing of the manner in which the elevator was used, was guilty of negligence in not furnishing such light around the elevator as would have enabled intestate to discover that the car had been removed, just as defendant could have apprehended that it might be removed. (*Jones v. N. Y. C. & H. R. R. Co.*, 28 Hun, 364; *affd.* by Court of Appeals without opinion, 92 N. Y. 628; *Fordham v. Gouverneur Village*, 160 id. 541; *Hart v. Hudson River Bridge Co.*, 80 id. 622.) The case seems to us clearly distinguishable from that especially relied upon of *Bond v. Smith* (113 N. Y. 378). Passing by the question of defendant's negligence as a direct cause of intestate's fall and death, defendant's counsel argues the companion one of intestate's freedom from contributory negligence, strenuously insisting that plaintiff has not established in her favor that essential proposition. Here, again, we are to apply to the decision of this contention rules which are reasonable and which are adapted to the inherent conditions of the case. We cannot know from the injured party what he did before meeting with his accident, or even what motives, intentions and beliefs governed such conduct. Neither is there any other person who can describe even partially what occurred just before the intestate fell, and plaintiff's only recourse is to establish surrounding facts and circumstances from which a jury may properly infer that the deceased exercised reasonable care. As was said in *Tolman v. Syracuse, Binghamton & N. Y. R. R. Co.* (98 N. Y. 198, 203): "If, in such case, the surrounding facts and circumstances reasonably indicate or tend to establish that the accident might have occurred without negligence of the deceased, that inference becomes possible, in addition to that which involves a careless or willful disregard of personal safety, and so a question of fact may arise to be solved by a jury and require a choice between possible, but divergent, inferences." And, again, in *Schafer v. Mayor* (154 N. Y. 466, 472) it was said: "The plaintiff's intestate was bound to exercise reasonable care; but if, owing

to the circumstances, the evidence of care was weak, it does not follow that it was not for the consideration of the jury. If there was any evidence upon the subject, the case should have been submitted to them for decision." I think that the facts established by plaintiff's evidence in the case warranted the deduction by the jury that her intestate was not guilty of carelessness, and that the occurrence of the accident was entirely consistent with the exercise of reasonable care upon his part. If I have estimated aright the testimony given by the witnesses McKeever and Sparks, the jury might say that after finishing his errand in the room at the end of the hall the intestate shortly returned to the elevator for the purpose of taking charge of it and completing his repairs. He had left it a few moments before at the landing with the door permitting approach to it closed and locked. He had no knowledge of the defect in this lock or that any person was liable to come along and move the elevator away to some other place. As he unlocked and opened the door he had a right to assume that the elevator would be where he had left it and that he might safely step from the landing into it. Under such circumstances it was not incumbent upon plaintiff to show by her evidence that the intestate, after having opened the door, looked to see if the elevator was there before attempting to step into it. Elevators do not of themselves move away and he had no knowledge that some human agency was liable to be applied to it to that end. The jury could say that he had a right to believe that the conditions which he had left a few moments before would continue and if they had continued he would not have met with his accident. Neither can it be said as matter of law that in the dim light surrounding the elevator shaft the intestate ought to have seen that the elevator was gone. It could be fairly said upon all the evidence that a person approaching, as the intestate did, and allowed to assume that the elevator was there, might reasonably step into the shaft before discovering its absence and that he would not be guilty of negligence in so doing. It is called to our attention that the witness McKeever saw the elevator moving up the shaft just before it is assumed that the accident happened to intestate and argued that, therefore, intestate should have noticed its absence. But a jury might say that McKeever, who apparently was quite familiar with the building, might notice the presence of the elevator in motion up the shaft while intestate expecting to find it stationary at the floor would not detect its absence. So upon this question I think that plaintiff established a case for the jury within *Jones v. N. Y. C. & H. R. R. Co.* (28 Hun, 364, *supra*); *Schafer v. Mayor* (154 N. Y. 466); *Galvin v. Mayor, etc., of N. Y.* (112 id. 223); *Tolman v. Syracuse, Binghamton & N. Y. R. Co.* (98 id. 198). The defendant urges as a defense superior to and independent of these questions of negligence and contributory negligence that it maintained the city hall in the exercise of a purely governmental function and that, therefore, it assumed no duty to the plaintiff, a violation of which would impose liability upon it in this action. I cannot, however, concur in this view. Of course it is well settled that a municipal corporation may act in two capacities, one governmental as the agent of the State in the performance of those duties which devolve primarily upon it in the exercise of its sovereign power of government for the common benefit of all of the people of the State; the other, municipal, in the performance of duties voluntarily assumed and exercised in respect to its local or special interests for the particular benefit and advantage of the locality and its inhabitants. (*Maximilian v. Mayor*, 62 N. Y. 160; *Eddy v. Village of Ellicottville*, 35 App. Div. 256.) While acting in the former capacity it could not be made liable for an accident of the nature of that proven in this case, whereas while acting in the latter capacity it might be made subject to the operation of those principles which have been invoked against it in this case. While the courts in some other States may have gone to the extent of holding that the maintenance and operation of a city hall would be incidental to the discharge by a municipality of its governmental functions, no authority to that effect has been called to our attention from the decisions in this State. Without a lengthy discussion of the subject it seems clear that the building wherein the accident happened was maintained by the defendant in whole or part for its use, convenience and benefit in the conduct and discharge of those municipal obligations and duties imposed or assumed with respect to its special and local interests, and that, therefore, it may be held liable for negligence in the premises. (*Eddy v. Village of Ellicottville*, *supra*; *Quill v. Mayor*, 36 App. Div. 476; *Galvin v. Mayor, etc., of N. Y.*, *supra*.) Some other questions have been raised upon the appeal which it is not necessary

App. Div.]

Fourth Department, January, 1906.

to consider specifically. In my opinion the plaintiff produced evidence which entitled her to the verdict which was awarded by the jury, and the judgment should be affirmed. Spring, J., concurred.

The H. Remington & Son Pulp & Paper Company, Respondent, v. The Water Commissioners of the City of Watertown, Appellants.

*Watercourse — erroneous finding as to height of crest of dam — height of dam to be taken from level of average flow of stream, not from the minimum level.*

This is an appeal from an interlocutory judgment of the Supreme Court, entered in Jefferson county clerk's office April 14, 1903, in favor of the plaintiff.

NASH, J. It seems to be conceded that the crest of the defendant's dam is two and seventy-seven one-hundredths feet above the level of the average flow of the water at the property line of the plaintiff, instead of that height above the level of the water at the point where the plaintiff proposes to erect its dam, as erroneously found in the eleventh finding of fact. The finding is based upon the levelings taken of the average minimum flow of water, whereas, the rights of the parties are to be governed by the ordinary stage of the water. The finding that "such backing of the water greatly reduced the plaintiff's head at said site, so that in low and medium water the power will be seriously diminished," erroneously implies that the rights of the parties may be based upon "low and medium water," instead of the ordinary flow. The seventh finding of fact, determining the head or height of the fall of water which could be produced at the proposed site for a dam, is also based upon the erroneous figures found in said eleventh finding, as is also the rest of this finding. The facts found in said seventh finding of fact, and in the 8th, and the 2d, 3d, 4th and 5th paragraphs of the eleventh finding of fact, are matters which should be passed upon and determined upon a reference or by a commission in assessing the damages which the plaintiff has and will sustain if any, by reason of the construction and maintenance of the defendant's said dams at their present height, and the same should, therefore, have been omitted from the findings as a basis of an interlocutory judgment. While it is unfortunate that a new trial of this case should be had, still we see no other way to dispose of it, unless the parties stipulate to correct the errors referred to. All concurred. Interlocutory judgment reversed and new trial ordered, with costs to the appellant to abide event.

Frank A. Weddigan and John Meyer, Respondents, v. William F. Whiting, Appellant. — Judgment affirmed, with costs. All concurred, except Nash, J., not voting.

Frank A. Weddigan and John Meyer, Respondents, v. William F. Whiting, Appellant. — Order affirmed, with costs. All concurred, except Nash, J., not voting.

Charles Fay, by Margaret Fay, His Guardian ad Litem, Respondent, v. Moose River Lumber Company, Appellant. — Judgment and order reversed and new trial ordered, with costs to the appellant to abide the event upon the law and facts, unless the plaintiff stipulates to reduce the verdict to the sum of \$1,500, as of the date of the rendition thereof, in which event the judgment is modified accordingly, and as thus modified the judgment and the order denying motion for a new trial are affirmed, without costs of this appeal to either party. All concurred.

Marcella Brown, Appellant, v. Adam Brown, Respondent. — Judgment modified by striking out the allowance of costs, and as thus modified said judgment and the order are affirmed, without costs of this appeal to either party. All concurred.

Marcella M. Keefe, Respondent, v. The Liverpool and London and Globe Insurance Company, Appellant. — Judgment and order affirmed, with costs. All concurred.

Joseph G. Wilbert, Respondent, v. Jacob Isnecker, Appellant. — Judgment and order affirmed, with costs. All concurred.

Wright A. Yetter, Respondent, v. Lake Erie Wine Cellars, Appellant. — Judgment and order affirmed, with costs. All concurred; Nash, J., not sitting.

Syracuse Trust Company, Respondent, v. Syracuse Construction Company, Defendant, Impleaded with Margaret E. Kaufmann and Franklin J. Kaufmann, as Executors, etc., of John S. Kaufmann, Deceased, Appellants. — Judgment and order affirmed, with costs. All concurred.

Marine National Bank of Buffalo, Respondent, v. Walter D. Greene, Appellant, Impleaded with Joseph H. Rebstock and Others.— Judgment affirmed, with costs. All concurred.

C. Frank Moore, Respondent, v. Delaware, Lackawanna and Western Railroad Company, Appellant.— Judgment and order affirmed, with costs. All concurred.

Glenwood Swarthout, an Infant, by Albert C. Bickelhaupt, His Guardian ad Litem, Appellant, v. Nettie Culver and Others, Respondents, Impleaded with Others.— Judgment affirmed, with costs. All concurred; Nash, J., not sitting.

Thomas A. Donohue, Respondent, v. American Bridge Company of New York, Appellant.— Judgment and order affirmed, with costs. All concurred, except Nash, J., who dissented.

John Hofman Company, Respondent, v. Edward Murphy, 2d, and Century Mercantile Company, Appellants.— Judgment and order affirmed, with costs. All concurred.

Alice Wilcox, Respondent, v. New York Central and Hudson River Railroad Company, Appellant.— Judgment affirmed, with costs. All concurred, except Hiscock and Nash, JJ., who dissented.

Charles T. Blansett, Appellant, v. Walter B. Duffy, Respondent.— Judgment affirmed, with costs. All concurred.

Emma D. Pitkin, as, etc., Appellant, v. New York Central and Hudson River Railroad Company, Respondent.— Motion for leave to appeal to the Court of Appeals granted.

Allen L. Wood, Appellant, v. Hyman Snider, Respondent.— Motion for leave to appeal to the Court of Appeals granted, the order and questions to be certified to be settled by and before Mr. Justice Spring on two days' notice.

Polly A. Hood, as Administratrix, etc., v. Lehigh Valley Railroad Company.— Motion for leave to appeal to the Court of Appeals granted.

Harriet A. Linzy, Appellant, v. Mary E. Whitney and Others, Respondents.— Motion for order substituting the temporary administrator of Mary E. Whitney, one of the respondents now deceased, in the place and stead of said Mary E. Whitney, granted.

Philena Briggs, Respondent, v. Alice I. Weeks and Another, Appellants.— Motion to place cause on calendar of present term granted.

In the Matter of the Appraisal under the Act in Relation to Taxable Transfers of Property of the Property of John Pratt, Deceased. The Comptroller of the State of New York, Appellant; Hannah A. Pratt, as Executrix, etc., of John Pratt, Deceased, and Others, Respondents.— Order reversed as to the real property covered by the deed of deceased and described in Exhibit C, with costs to the appellant, and matter remitted to Surrogate's Court with direction to impose the tax on such property. All concurred; Hiscock, J., not sitting.

Addie A. Allen, Respondent, v. Albert H. Pierson, and Others, Appellants.— Order affirmed, with ten dollars costs and disbursements. All concurred; Hiscock, J., not sitting.

United States Condensed Milk Company, Appellant, v. Max Smith and Jacob Smith, Respondents.— Order modified so as to provide that the place of trial shall be changed from Oneida county to Ulster county, and as so modified affirmed, without costs of this appeal to either party. All concurred, except McLennan, P. J., who voted for reversal and denial of motion; Hiscock, J., not sitting.

J. Howard Mark, Respondent, v. Albert Krippendorf and William Fritsch, Appellants.— Order affirmed, with ten dollars costs and disbursements. All concurred; Hiscock, J., not sitting.

Earl Burlingame, Respondent, v. James H. Dykeman, Appellant.— Order reversed, without costs, and motion granted changing the place of trial from Wyoming to Orange county. All concurred, except McLennan, P. J., who dissented; Hiscock, J., not sitting.

Elmer E. Roberts, Individually and as Administrator with the Will Annexed of William Roberts, Deceased, and Others, Respondents, v. William E. Gifford, Appellant, Impleaded with Fanny L. Roberts and Others.— Orders affirmed, with ten dollars costs and disbursements. All concurred; Hiscock, J., not sitting.

Julia A. Deegan, as Administratrix, etc., of Thomas E. Deegan, Deceased, Appellant, v. Syracuse Lighting Company, Respondent.— Judgment affirmed, with costs. All concurred; Hiscock, J., not sitting.

App. Div.]

Fourth Department, January, 1906.

Samuel O. Stoddard, Respondent, v. Richard Rusaw, Appellant.—Judgments affirmed, with costs. All concurred; Hiscock, J., not sitting.

George F. Cameron, Appellant, v. Jane McBride and Charles H. Root, Respondents.—Judgment affirmed, with costs. All concurred.

In the Matter of the Final Settlement of the Accounts of Sarah M. Bailey, as, etc., Estate of Octavia R. Warner, Deceased.—Decree of Surrogate's Court affirmed, with costs, on the opinion of Simons, Surrogate. All concurred.

Arthur V. Marlette and Others, Respondents, v. Lena Tumpowski and Others, Appellants.—Judgment affirmed, with costs. All concurred.

Isaac E. Baird, as Administrator, etc., of Garfield Baird, Deceased, Appellant, v. Erie Railroad Company, Respondent.—Judgment affirmed, with costs. All concurred, except Spring, J., who dissented; Nash, J., not sitting.

George H. Chadeayne, Appellant, v. City of Buffalo, Respondent.—Judgment affirmed, with costs. All concurred; Kruse, J., not sitting.

Thomas R. Levis & Company, Respondent, v. Louis Ehrenberg, Appellant.—Order affirmed, with ten dollars costs and disbursements. All concurred.

Helena O. Mead, Appellant, v. New York Life Insurance Company, Respondent. (Action No. 1).—Interlocutory judgment affirmed, with costs. All concurred.

Sarah J. Lewis, Appellant, v. Delaware, Lackawanna and Western Railroad Company, Respondent.—Judgment affirmed, with costs. All concurred.

In the Matter of the Application of the Grade Crossing Commissioners of the City of Buffalo, Appellants, for the Appointment of Commissioners to Ascertain the Compensation to Be Paid to the Owners of and Parties Interested in Certain Lands, etc., Claimed to Be Owned by August Schneider and Others. (Proceeding No. 67.) William Simon, Respondent.—Order affirmed, with costs. All concurred; Hiscock, J., not sitting.

Fred Myers, Appellant, v. The Town of Gates, Respondent.—Judgment and order affirmed, with costs. All concurred.

James H. Brown, Appellant, v. George H. Palmer, Respondent. Judgments reversed, with costs, and new trial ordered in Municipal Court. The order herein to be settled by and before Mr. Justice Nash on two days' notice. Held, that the plaintiff having, in good faith and without knowledge of any mistake, furnished material and caused his employees to put a roof on defendant's barn in a manner satisfactory to and as directed by defendant, it is immaterial that the defendant did not know that such material was furnished by the plaintiff instead of another, and that his employees did the work. Having received the benefits resulting from the furnishing of the labor and materials, the defendant cannot avoid liability by asserting that he did not know the identity of the person who furnished and performed the same, and so, even although he had contracted with another party to do the same work and believed it was in fact being done by such other party. All concurred.

Lydell L. Wilson, Respondent, v. New York Milk Products Company, Appellant.—Judgment affirmed, with costs. All concurred.

Oil Well Supply Company, Respondent, v. Phoenix Iron Works Company, Appellant.—Judgment affirmed, with costs. All concurred.

Harry S. Gail and Others, Respondents, v. Christian Fischer, Appellant, Impleaded with Charles Fischer.—Judgment affirmed, with costs. All concurred.

In the Matter of the Final Accounting of Francis N. Fitch and Irving N. Tuttle, as Executors, etc., of Sophronia Norton, Deceased. Francis N. Fitch, Appellant; Jacob Van Wee and Others, Legatees, Respondents.—Order affirmed, with ten dollars costs and disbursements against the appellant personally. All concurred.

In the Matter of the Application of the City of Rochester, Respondent, to Acquire Lands of Lillian C. Davis, Appellant.—Order affirmed, with ten dollars costs and disbursements. All concurred.

Lydia L. Powell, a Creditor of the United States Mutual Accident Association of the City of New York, Suing in Her Own Behalf and for All Others Similarly Situated Who Shall Join with Plaintiff and Contribute to the Expenses Thereof, Respondent, v. John H. C. Nevius, Appellant, Impleaded with Charles B. Peet and Others.—Interlocutory judgment affirmed, with costs, and demurrer sustained, with costs, with leave to plead over upon payment of the costs of the demurrer and of this appeal. All concurred; Kruse, J., not sitting.

Third Department, January, 1906.

[Vol. 111.]

Clinton Snook, Respondent, v. Ida L. French, Appellant, Impleaded with Mansfield J. French and Others.—Judgment affirmed, with costs. All concurred.

In the Matter of the Petition of William Smith, Respondent, for an Order Revoking and Canceling Liquor Tax Certificate No. 26,152, Issued to Stephen R. Ryan, Appellant.—Order affirmed, with costs. All concurred.

Harvey C. Rice, Respondent, v. Town of Adams, Appellant.—Motion for reargument denied, with ten dollars costs, Motion for leave to appeal to Court of Appeals denied.

Harold E. Raymond, Respondent, v. New York Central and Hudson River Railroad Company, Appellant.—Motion for reargument denied, with ten dollars costs. Motion for leave to appeal to Court of Appeals denied.

Arthur Worden, Respondent, v. Clarence D. Bentley, Appellant.—Motion to dismiss appeal granted, with ten dollars costs, unless appellant, within twenty days, files and serves printed papers on appeal, as provided by rule 41,\* and pays respondent's attorney ten dollars costs of this motion, in which event the motion is denied.

Gilbert M. Vandevoort, as, etc., Respondent, v. Lincoln A. Mink, Appellant.—Motion to dismiss appeal denied, with ten dollars costs.

Charles Hagadorn, Appellant, v. Miles M. McNair and Another, Respondents.—Motion to amend remittitur denied, with ten dollars costs.

Edwin R. Mink, as, etc., Appellant, v. Fred L. Mink, Respondent.—Motion to dismiss appeal granted, with ten dollars costs.

Celina A. Green, as, etc., Respondent, v. Utica and Mohawk Valley Railway Company, Appellant.—Motion for leave to appeal to the Court of Appeals denied, with ten dollars costs and disbursements.

The People of the State of New York ex rel. Board of Health of the Village of Friendship, Respondent, v. George W. Friez, Appellant.—Motion for leave to appeal to Court of Appeals granted and question to be reviewed certified to that court.

David Winchell, Respondent, v. Town of Camillus, Appellant.—Motion for leave to appeal to the Court of Appeals granted.

In the Matter of the Appointment of a Board of Examiners to Examine into the Operation of the Jury System of the County of Erie, Created by Chapter 369 of the Laws of 1895.—Report of examining board received, approved, filed and a certified copy therefor ordered transmitted to the commissioner of jurors for the county of Erie.

Alice Wilcox, Respondent, v. New York Central and Hudson River Railroad Company, Appellant.—Motion for leave to appeal to the Court of Appeals granted.

### THIRD DEPARTMENT, JANUARY, 1906.

Thomas H. Appleby and Ruby A. Appleby, Respondents, v. Chester L. Dalrymple, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion.

Watson B. Berry, Respondent, v. David A. French, Appellant.—Judgment and orders unanimously affirmed, with costs. No opinion.

Jerden Bronk, Respondent, v. The Binghamton Railroad Company, Appellant.—Judgment and order affirmed, with costs. No opinion. All concurred, except Parker, P. J., dissenting.

The Century Mercantile Company, Appellant, v. Matthew A. Heeran, Late Sheriff of the County of Rensselaer, Respondent. (Action No. 1.)—Interlocutory judgment affirmed, with costs, with usual leave to amend on payment of costs. No opinion. All concurred.

Elizabeth Cook and Others, Respondents, v. Addison C. Griswold, Individually and as Executor, etc., of Susan Daglish, Deceased, and Others, Appellants.—Judgment affirmed, without costs. No opinion. All concurred, except Chase, J., not voting.

\* General Rules of Practice.—[REP.]



App. Div.]

Third Department, January, 1906.

John K. Cullin, Appellant, v. William J. Alvord, as Sheriff, etc., of Columbia County, Respondent, Impleaded with Matthew R. Ryder.— Judgment unanimously affirmed, with costs. No opinion.

Marion Daley, an Infant, etc., by Joseph M. Daley, Her Guardian ad Litem, Respondent, v. Dennis Ratigan, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion.

Chester H. Gregory, Respondent, v. Elmira Water, Light and Railroad Company, Appellant.— Motion granted.

Hinckel Brewery Company, Plaintiff, v. Christopher Newman, Sometimes Called Chris. Newman, Respondent. (No. 1.)— Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred, except Chester, J., dissenting.

Hinckel Brewery Company, Plaintiff, v. Christopher Newman, Sometimes Called Chris. Newman, Respondent. (No. 2.)— Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred, except Chester, J., dissenting.

David H. Ingalls, Respondent, v. Albertus D. Perkins and William T. Perkins, Appellants.— Judgment and order unanimously affirmed, with costs. No opinion.

Hiram Kells, Respondent, v. J. E. Davis Manufacturing Company, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion.

John Landin, Respondent, v. Cunard Steamship Company, Limited, Appellant.— Judgment unanimously affirmed, with costs. No opinion.

Irving Moyer, Appellant, v. The Village of Nelliston, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.

In the Matter of the Application of Thomas H. Dwyer, Appellant, for a Writ of Mandamus against William H. Gearin, as Comptroller of the City of Troy, Respondent.— Order affirmed, with costs. No opinion. All concurred, except Kellogg, J., dissenting.

Patrick McGuire, Appellant, v. Union Mutual Life Insurance Company, Respondent.— Order modified so that instead of amending the notice of appeal it directs an acceptance of the notice of appeal served June 22, 1905, and as so modified affirmed, without costs. No opinion. All concurred.

In the Matter of the Claim of Elijah Shoen, Respondent, v. E. J. Scott, as Administrator with the Will Annexed of Archibald Scott, Deceased, Appellant.— Judgment unanimously affirmed. No opinion.

Elizabeth McCall, Appellant, v. Supreme Council American Legion of Honor, Respondent.— Judgment reversed and new trial granted, with costs to appellant to abide event, upon the authority of *Butler v. Supreme Council* (105 App. Div. 164). No opinion. All concurred.

Irving Moyer, Respondent, v. The Village of Nelliston, Appellant.— Motion to dismiss appeal denied, without costs.

The People of the State of New York ex rel. Fahnestock Transmitter Company, Relator, v. Otto Kelsey, as Comptroller of the State of New York, Respondent.— Determination of the Comptroller confirmed, with fifty dollars costs and disbursements. No opinion. All concurred.

George B. Sweet, Respondent, v. Joseph Howell, as Administrator, etc., of Sophia Howell, Deceased, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion.

William G. Strait and Others, Respondents, v. Walter E. Lindsay, Appellant, and Others Who, with Said Walter E. Lindsay, Comprise the Firm of Walter E. Lindsay & Company.— Judgment and order unanimously affirmed, with costs. No opinion.

William R. Slocum, Respondent, v. Byron J. Town and Cassius B. Thomas, Appellants.— Judgment and order unanimously affirmed, with costs. No opinion; Kellogg, J., not sitting.

Frank Walrod, Appellant, v. Henry Noel, as Treasurer of Inland Seamen's Union, Respondent.— Judgment unanimously affirmed, with costs. No opinion.

Matthias H. Arnot, as Trustee, v. Union Salt Company.— Motion for reargument denied.

Lordville and Equinunk Bridge Company v. Charles De Lackner.— Motion granted, with ten dollars costs, unless the appellant, within thirty days after service of a copy of this order, file and serve the necessary papers on appeal and

First Department, January, 1906.

[Vol. 111.]

pay ten dollars for the default and ten dollars costs of motion, in which case motion denied, without costs.

Patrick Monahan v. Schenectady Railway Company.—Motion denied.

Mary E. Mack v. Thomas J. Hilsinger.—Motion granted.

John H. Rourke and Others v. The Elk Drug Company and Others.—Motion denied.

Albert A. Vaughn v. Glens Falls Portland Cement Company.—Motion denied.

In the Matter of the Application of Wilton Avedis Hall for Admission to Practice as an Attorney and Counselor at Law.—Motion granted.

In the Matter of the Application of John H. Mack for Admission to Practice as an Attorney and Counselor at Law in the State of New York.—Application granted.

Matthias H. Arnot, as Trustee, Respondent, v. Union Salt Company, Appellant.—Decision amended so as to read as follows: Judgment affirmed, with costs. Opinion by Smith, J. (Reported in 109 App. Div. 433, 440.)

The People of the State of New York ex rel. William Bidwell, Respondent, v. Sebastian W. Pitts, as Sheriff of Albany County, New York, and Custodian of the Albany County Penitentiary, Appellant.—Order reversed, writ of habeas corpus quashed, and relator remanded to the custody of the sheriff of Albany county, as custodian of the penitentiary, to serve balance of his term, on the authority of *People ex rel. Bidwell v. Pitts* (ante, p. 819). All concurred.

Charles Vroman, Respondent, v. Thomas Maher and Jeremiah Maher, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.

### FIRST DEPARTMENT, JANUARY, 1906.

John W. Sterling, as an Executor, etc., of Edwin S. Chapin, Deceased, Appellant, Respondent, v. Albert K. Chapin, Individually and as an Executor, etc., of Edwin S. Chapin, Deceased, Respondent, Appellant.—Cross-appeals from a judgment entered on the report of a referee and from an order granting costs.

PER CURIAM: The order appealed from should be affirmed, without costs. And upon the authority of *Sterling v. Chapin* (102 App. Div. 589) the judgment appealed from should also be affirmed, without costs. Present—O'Brien, P. J., Ingraham, Laughlin, Clarke and Houghton, JJ.; Laughlin, J., dissented on his opinion on the previous appeal. Order affirmed, without costs. Judgment affirmed, without costs.

Achille J. Oishel, Respondent, v. Metropolitan Street Railway Company and Annie Gallo, Appellants.

*Attorney and client—attorney's lien on settlement by client—no lien for costs.*

Appeal from a judgment entered upon a decision after trial at Special Term. McLAUGHLIN, J.: The defendant Annie Gallo, wife of Domenico Gallo, one of the defendants in two actions brought by this plaintiff against him and the Metropolitan Street Railway Company, brought an action to recover damages for personal injuries sustained by her through the negligence of the railway company. Prior to the commencement of the action she entered into a written agreement with her attorney, which provided, among other things, as follows: "I do hereby agree, stipulate and contract with my said attorney to pay him one-half of any settlement or recovery had in said action, and he is, in addition thereto, to receive all costs and interests recovered or to which he may be entitled. And I further agree with my said attorney not to make any settlement unless he is present and receives his share in accordance with this agreement." That action was settled, without the knowledge or consent of the plaintiff's attorney, for \$200, and a general release given. After the settlement the attorney (this plaintiff) brought this action against the railway company and Annie Gallo, to enforce a lien which he asserted he had upon the proceeds of the settlement. The action was tried without a jury, and in the decision filed judgment was entered adjudging and decreeing that the plaintiff had a lien upon one-half of the consideration for the settlement, viz., \$100, and in addition thereto the costs in the negligence action to the time of the settlement, viz., \$95.50, making in all, \$195.50. Each defendant appeals from this judgment. For the reasons stated in *Oishel v. Metropolitan*

App. Div.]

First Department, January, 1906.

*Street R. Co.* No. 1 (110 App. Div. 709) the judgment is erroneous, in so far as it determines that the plaintiff had a lien on \$95.50, the costs in the negligence action to the time of settlement, and must be modified by deducting therefrom said sum. The judgment appealed from, therefore, is modified by deducting therefrom the sum of \$95.50, and as thus modified the same is affirmed, without costs to either party. O'Brien, P. J., Ingraham, Laughlin and Clarke, JJ., concurred. Judgment modified as directed in opinion, and as modified affirmed, without costs to either party.

Achille J. Oishei, Respondent, v. Metropolitan Street Railway Company and Domenico Gallo, Appellants. (Action No. 2.)

*Attorney and client — attorney's lien on settlement by client — no lien for costs.*

Appeal from a judgment entered upon a decision after trial at Special Term.

MCLAUGHLIN, J.: A minor son of the defendant Gallo sustained personal injuries by reason of the negligence of the defendant railway company, and Gallo thereafter brought an action against it to recover damages for the loss of his services. Prior to the commencement of the action he entered into a written agreement with his attorney, which provided, among other things, as follows: "I do hereby agree, stipulate and contract with my said attorney to pay him one-half of any settlement or recovery had in said action, and he is, in addition thereto, to receive all costs and interests recovered or to which he may be entitled. And I further agree with my said attorney not to make any settlement unless he is present and receives his share in accordance with this agreement." That action was settled without the knowledge or consent of the plaintiff's attorney for \$100, and a general release given. After the settlement the attorney (this plaintiff) brought this action against the railway company and Gallo, to enforce a lien which he asserted he had upon the proceeds of the settlement. The action was tried without a jury and in the decision filed judgment was entered adjudging and decreeing that the plaintiff had a lien upon one-half of the consideration for the settlement, viz., \$50, and in addition thereto the costs in the negligence action to the time of the settlement, viz., \$95.50, making in all \$145.50. Each defendant appeals from this judgment. For the reasons stated in *Oishei v. Metropolitan Street R. Co.* No. 1 (110 App. Div. 709), the judgment is erroneous in so far as it determined that the plaintiff had a lien on \$95.50, the costs in the negligence action to the time of settlement, and must be modified by deducting therefrom said sum. The judgment appealed from, therefore, is modified by deducting therefrom the sum of \$95.50, and as thus modified the same is affirmed, without costs to either party. O'Brien, P. J., Ingraham, Laughlin and Clarke, JJ., concurred. Judgment modified as directed in opinion, and as modified affirmed, without costs to either party.

Alexander M. Copstein, as Administrator, etc., of Alice Copstein, Deceased, Respondent, v. Union Railway Company of New York City, Appellant. — Judgment and order reversed, new trial ordered, costs to appellant to abide event, unless plaintiff stipulates to reduce judgment as entered, including interest, costs, etc., to \$1,874.31, in which event judgment as so modified and order affirmed, without costs. No opinion.

Barrett Chemical Company, Appellant, v. Julius Stern, Respondent. — Judgment affirmed, with costs. No opinion.

Henry Harbeck and Hester E. Harbeck, Respondents, v. John J. Tobin, Appellant. — Judgment and order affirmed, with costs. No opinion.

Grenville A. Smith, Appellant, v. John Edward Marsh and Others, Respondents. — Judgment affirmed, with costs. No opinion.

Antonio Meli, an Infant under the Age of Fourteen Years, by Andrea Meli, His Guardian ad Litem, Respondent, v. Metropolitan Street Railway Company, Appellant. — Judgment and order affirmed, with costs. No opinion.

Madeline Tunison, Respondent, v. Metropolitan Street Railway Company, Appellant. — Judgment and order reversed and new trial ordered, with costs to appellant to abide event, unless plaintiff stipulates to reduce judgment as entered, including costs, etc., to \$1,585.05, in which event judgment as so modified and order affirmed, without costs. No opinion.

William G. Barson and Charles H. Barson, Respondents, v. Agnes K. Murphy Mulligan and William G. Mulligan, Appellants. — Order affirmed, with ten dollars costs and disbursements. No opinion.

In the Matter of the Petition of Sarah Roxbury, Appellant, for the Payment of the Income of a Trust Fund Out of the Estate of Thomas J. Kearney, Deceased. Edward E. McCall and William H. Buckley, as Surviving Trustees under the Last Will and Testament of Thomas J. Kearney, Deceased, Respondents.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Jacques C. Cohn, Appellant, v. Sidney P. Hessel and Others, Respondents, Impleaded with Another.—Order affirmed, with ten dollars costs and disbursements. No opinion.

John A. Sloane, Respondent, v. Metropolitan Street Railway Company, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Santo Reda, Respondent, v. Herman J. Rohrich and Ida M. Rohrich, His Wife, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion.

The People of the State of New York ex rel. James H. Lomax, Relator, v. Francis V. Greene, as Police Commissioner of the City of New York, Respondent.—Writ dismissed and proceedings affirmed, with costs. No opinion.

In the Matter of School Site, Delancey and Rivington Streets.—Motion granted. The People of the State of New York ex rel. Joseph Fennelly v. Amalgamated Copper Company and Another. The People of the State of New York ex rel. Joseph Fennelly v. United Copper Company and Another.—Motions granted. See memorandum.

James T. Bridges and Another v. George B. Wade.—Motion denied, with ten dollars costs.

Johnson County Savings Bank v. George F. Phillips.—Motion denied, with ten dollars costs.

Anne McCormack v. Charles E. Coddington and Others.—Motion granted; questions certified as stated in memorandum.

In the Matter of Charles L. Tiffany, Deceased.—Motion denied, with ten dollars costs.

In the Matter of Hester Street School Site.—Reference ordered. See memorandum.

Samuel Hoff v. Robert H. Reid & Company.—Motion denied, with ten dollars costs.

Peter A. Gage v. The City of New York and Others.—Motion to certify questions to the Court of Appeals denied, with ten dollars costs, and motion to resettle order granted. See memorandum per curiam.

James A. Deering v. John Schreyer.—Motion denied, without costs. Memorandum per curiam.

Josephine Bean v. New York Edison Company.—Motion denied, with ten dollars costs.

F. J. Emmerich Company v. W. & J. Sloane.—Motion granted.

Edwin W. Knickerbocker v. Benn Conger and Others.—Motion denied, with ten dollars costs.

In the Matter of David Rothschild.—Motion denied, with ten dollars costs.

Muscatine Mortgage and Trust Company v. W. Irving Scott, Individually, etc.—Motion denied, with ten dollars costs.

John J. Keyes v. George C. Flint Company.—Motion denied, with ten dollars costs.

Addie E. Smith v. Borden's Condensed Milk Company.—Motion denied, with ten dollars costs.

Globe and Rutgers Fire Insurance Company v. The Robbins & Myers Company.—Motion denied, with ten dollars costs.

Vivian A. Buffum v. Willard J. Avery.—Motion granted so far as to dismiss appeal, with ten dollars costs.

Warren D. Smith v. Sigmund H. Bleier and Others.—Motion granted so far as to dismiss appeal, with ten dollars costs.

The Arlington Company, Respondent, v. The Insurance Company of New York, Appellant. The Arlington Company, Respondent, v. Fourteen Other Insurance Companies, Appellants.—Orders affirmed, with ten dollars costs and disbursements of one appeal. No opinion.

Helen J. Taylor v. Georgianna Briggs and Others.—Motion granted so far as to dismiss appeal, with ten dollars costs.

Michigan Savings Bank, Plaintiff, v. Coy, Hunt & Company, Defendant.—Exceptions overruled and motion for new trial denied, with costs. No opinion.

App. Div.]

Second Department, January, 1906.

Michigan Savings Bank, Plaintiff, v. Charles F. Hubbs, Defendant.— Exceptions overruled and motion for new trial denied, with costs. No opinion.

Michael Coleman, Respondent, v. Interurban Street Railway Company, Appellant.— Judgment and order affirmed, with costs. No opinion. (Ingraham, J., dissenting.)

John Fox and Nicholas Engel, Respondents, v. The Norton & Dalton Contracting Company, Appellant, Impleaded with the City of New York.— Judgment affirmed, with costs. No opinion.

Michael Mulville, Respondent, v. Metropolitan Street Railway Company, Appellant.— Judgment and order affirmed, with costs. No opinion.

Philip Morris & Company, Limited, Respondent, v. Maurice B. Mendham and Louis P. Mendham, Appellants, Impleaded with Harry S. Souhami.— Judgment affirmed, with costs, with leave to defendant to withdraw demurrer and to answer on payment of costs in this court and in the court below. No opinion.

Jordan J. Rollins, Respondent, v. Sidney B. Bowman Cycle Company, Appellant.— Judgment and order affirmed, with costs. No opinion.

Philip Edison, Appellant, v. Interurban Street Railway Company, Respondent.— Judgment affirmed, with costs. No opinion.

Bernard Flood, Respondent, v. James G. Patton, Appellant.— Judgment and order affirmed, with costs. No opinion.

Anna J. Cooper, Appellant, v. Frank C. Clark, Respondent.— Judgment affirmed, with costs. No opinion.

Albert Elton and Others, Respondents, v. Gustave Hill and Samuel A. Scribner, Appellants.— Judgment and order affirmed, with costs. No opinion.

William P. Talbot, Respondent, v. Max Laubheim and Julius Laubheim, as Administrators with the Will Annexed of Samuel Laubheim, Deceased, and Others, Appellants.— Judgment and order affirmed, with costs. No opinion.

Rosa Basso, an Infant, by Pietro Basso, Her Guardian ad Litem, Respondent, v. Press Publishing Company, Appellant.— Judgment and order affirmed, with costs. No opinion.

Henry McGinn, Respondent, v. The G. H. Hammond Company, Appellant.— Judgment and order affirmed, with costs. No opinion.

Humphrey Driscoll, Respondent, v. Interurban Street Railway Company, Appellant.— Judgment and order affirmed, with costs. No opinion.

Thomas F. Burke, as Administrator, etc., of Johanna Burke, Deceased, Appellant, v. The New York Central and Hudson River Railroad Company, Respondent.— Judgment affirmed, with costs. No opinion. (O'Brien, P. J., and Laughlin, J., dissenting.)

## SECOND DEPARTMENT, JANUARY, 1906.

The People of the State of New York ex rel. William Collins and Fletcher Tracy, Relators, v. Girdell V. Brower and Others, Constituting the Board of Supervisors of the County of Nassau, Respondents.

*Board of supervisors — power to offer reward for information of horse thieves — liability therefor.*

Certiorari to review the action of the respondents in disallowing the claim of the relators. Determination confirmed, with costs, on the ground that the reward was offered to persons furnishing information or evidence to secure the conviction of persons guilty of crimes committed prior to its passage, and did not provide for the payment of rewards for conviction of offenses subsequently committed. Hirschberg, P. J., Woodward, Rich and Miller, JJ., concurred; Hooker, J., read for reversal.

HOOKEE, J. (dissenting): The board of supervisors of the county of Nassau audited and refused to allow a claim of the relators against the county for the sum of \$1,000, offered by a resolution of the board of supervisors adopted on the 13th day of September, 1901, to the person or persons furnishing to the district attorney information or evidence which would secure the arrest and conviction of the horse thieves who had been operating in that county. The relators showed themselves entitled to the reward, but the board refused to allow the claim for the reason that there was no authority in law for the payment thereof. The question presented, therefore, is whether the board of supervisors by its resolu-

Second Department, January, 1906.

[Vol. 111.]

tion had legal power to bind the county to the payment of the reward. This question was presented for the determination of this court in *Miller v. County of Nassau* (80 App. Div. 641), where the defendant appealed from a judgment which the plaintiffs had against it upon a claim for similar services under the same resolution of the board of supervisors as that contained in the record now before us. The affirmance of the judgment in that case has committed this court to a doctrine contrary to that now urged by the respondents, and their determination should be reversed, with costs.

In the Matter of the Application of Xenophon Pearce Huddy for Admission to the Bar.—Application for admission to the bar granted. Present—Hirschberg, P. J., Woodward, Jenks, Hooker and Gaynor, JJ.

Fannie C. Ryer, as Administratrix, etc., Respondent, v. Prudential Insurance Company of America, Appellant.—Motion for leave to appeal to the Court of Appeals granted. Present—Hirschberg, P. J., Woodward, Jenks, Hooker and Gaynor, JJ.

John Farrell, Appellant, v. The Brooklyn Heights Railroad Company, Respondent.—Order affirmed, with ten dollars costs and disbursements, on the authority of *Corbett v. Gibson* (18 Hun, 49). Hirschberg, P. J., Woodward, Jenks, Hooker and Gaynor, JJ., concurred.

In the Matter of the Appraisal of the Estate of Wager J. Hull, Deceased, Under the Acts Relative to the Taxable Transfers of Property.—Reargument ordered, and case set down for Monday, January 15, 1906. Present—Jenks, Hooker, Rich and Miller, JJ.

The People of the State of New York ex rel. Sylvester D. Baldwin, Respondent, v. William McAdoo, as Police Commissioner of the City of New York, Appellant.—Appeal dismissed, with costs. No opinion. Hirschberg, P. J., Woodward, Jenks and Hooker, JJ., concurred.

Mary J. Ricketts, Respondent, v. Henry-Powell Ramsdell and Others, Individually and as Executors of and Trustees under the Last Will and Testament of Homer Ramsdell, Deceased, Appellants.—Judgment and order affirmed, with costs. No opinion. Jenks, Hooker, Rich and Miller, JJ., concurred.

Anthony Savage, an Infant under the Age of Fourteen Years, by Michael Savage, His Guardian ad Litem, Respondent, v. The Brooklyn Heights Railroad Company, Appellant.—Judgment and order affirmed, with costs. No opinion. Hirschberg, P. J., Woodward, Jenks and Rich, JJ., concurred; Miller, J., dissented.

Theodore P. Shonts, Respondent, v. Edward R. Thomas and Others, Composing the Firm of Thomas & Post, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion. Hirschberg, P. J., Woodward, Jenks, Hooker and Gaynor, JJ., concurred.

Caroline C. Starkey, Respondent, v. Howard S. Webster and Others, Appellants.—Interlocutory judgment affirmed, with costs. No opinion. Hirschberg, P. J., Woodward, Jenks, Rich and Miller, JJ., concurred.

Herran Stump, Appellant, v. Julia L. Butterfield, as Executrix, etc., of Daniel Butterfield, Deceased, Respondent.—Order reversed, with ten dollars costs and disbursements, motion denied with costs, and verdict reinstated, upon the authority of *Dubuc v. Lazell, Dalley & Co.* (182 N. Y. 482). Hirschberg, P. J., Woodward, Jenks, Hooker and Gaynor, JJ., concurred.

Samuel Tierstein, Respondent, v. Max Glassberg, Appellant.—Judgment of the Municipal Court affirmed by default, with costs. Hirschberg, P. J., Woodward, Jenks, Hooker and Gaynor, JJ., concurred.

William J. Wilson, Respondent, v. Charles Weissel, Appellant.—Judgment of the Municipal Court affirmed by default, with costs. Hirschberg, P. J., Woodward, Jenks, Hooker and Gaynor, JJ., concurred.

In the Matter of the Application of Russell E. Colcord for Admission to the Bar.—Application for admission to the bar granted. Present—Hirschberg, P. J., Woodward, Jenks, Hooker and Gaynor, JJ.

Annie Andrews, as Administratrix, etc., Respondent, v. H. & H. Reiners, Appellant.—Reargument ordered on the sole question of the application of section 829 of the Code of Civil Procedure, and case set down for Monday, February 26, 1906. Present—Jenks, Hooker, Gaynor, Rich and Miller, JJ.

Edwin Clark, as Administrator de Bonis Non of the Estate of Sarah Clark, Respondent, v. Mathias Trost and John J. Clancy, Appellants.—Motion granted and order resettled so as to provide that the costs awarded to the plaintiff be

App. Div.]

Second Department, January, 1906.

included in the final judgment if rendered in favor of the plaintiff; and be set off if uncollected and final judgment is rendered in favor of the defendants. Present—Hirschberg, P. J., Woodward, Jenks, Hooker and Gaynor, JJ.

John W. Daly, Appellant, v. Paul F. Reineldt and Others, Respondents.—Motion to resettle and amend order granted to the extent of inserting a provision that the decision was made upon the facts as well as upon the law. Present—Hirschberg, P. J., Woodward, Jenks, Hooker and Gaynor, JJ.

Ferdinand Hosch Company, Respondent, v. City of New York, Appellant.—Motion for leave to perfect appeal denied, with costs. Present—Hirschberg, P. J., Woodward, Jenks, Hooker and Gaynor, JJ.

Walter Follett, Respondent, v. City of New York, Appellant.—Motion for leave to perfect appeal denied, with costs. Present—Hirschberg, P. J., Woodward, Jenks, Hooker and Gaynor, JJ.

In the Matter of the Judicial Settlement of the Accounts of Charles S. Collyer, as Administrator of Elizabeth Collyer, Deceased.—Motion to dismiss appeal denied, upon condition that the appellant pay ten dollars costs and perfect the appeal in time for argument at the next term of court; otherwise, motion to dismiss appeal granted, with costs. Present—Hirschberg, P. J., Woodward, Jenks, Hooker and Gaynor, JJ.

Martha Oser, Agent of Adolph Oser, Respondent, v. Charles A. Herrmann, Appellant.—Motion to dismiss appeal granted, with costs. Present—Hirschberg, P. J., Woodward, Jenks, Hooker and Gaynor, JJ.

James Snyder, Appellant, v. Monroe Eckstein Brewing Company, Respondent. Gustav Penet and Others, Defendants.—Motion denied. Present—Hirschberg, P. J., Woodward, Jenks, Hooker and Gaynor, JJ.

John W. H. Walden, Appellant, v. George W. Post, Jr., and John B. De Cue, as Sole Surviving Executor, etc.—Motion to dismiss appeal granted. Present—Hirschberg, P. J., Woodward, Jenks, Hooker and Gaynor, JJ.

George H. Bonny, Respondent, v. Frederick C. Bonny, Appellant.—Judgment affirmed, with costs. No opinion. Jenks, Hooker, Gaynor, Rich and Miller, JJ., concurred.

Curtiss P. Byron, Respondent, v. Isaac Gingold, Appellant.—We think the plaintiff assumed the hazard of obtaining a loan upon terms satisfactory to defendant; he fails to show that he did this. The judgment of the Municipal Court must, therefore, be reversed and a new trial ordered, costs to abide the event. Jenks, Hooker, Gaynor, Rich and Miller, JJ., concurred.

Frank C. Coles, as Executor, etc., of Eliza Grove Dickerson, Deceased, Respondent, v. Charles G. A. Graburn, Appellant.—Judgment affirmed by default, with costs. Jenks, Hooker, Rich and Miller, JJ., concurred.

George R. Crowley, Appellant, v. The City of New York, Respondent.—Judgment affirmed, with costs. No opinion. Jenks, Hooker, Rich and Miller, JJ., concurred.

Jens Peter Dyhr, Respondent, v. The Bush Company (Limited) and Scandinavian-American Line, Appellants.—Judgment and order affirmed, with costs. No opinion. Woodward, Rich and Miller, JJ., concurred; Jenks, J., dissented.

Emily C. Jennings, Respondent, v. Henry D. House and James Van Kirk, Defendants, Impleaded with Alonzo H. Knapp, Appellant.—Judgment and order affirmed, with costs. No opinion. Hirschberg, P. J., Jenks and Rich, JJ., concurred; Woodward and Miller, JJ., dissented.

Charles E. Miller, Respondent, v. Clarence Vining, Appellant.—Judgment of the Municipal Court affirmed by default, with costs. Jenks, Hooker, Gaynor, Rich and Miller, JJ., concurred.

Edward H. Moran, Respondent, v. Walter L. Kent, Appellant.—Judgment of the Municipal Court affirmed, with costs. No opinion. Jenks, Hooker, Gaynor, Rich and Miller, JJ., concurred.

The People of the State of New York, Respondent, v. Michael Christianna, Appellant.—We think the evidence is insufficient to establish the guilt of the accused beyond a reasonable doubt. Judgment of conviction reversed. Hirschberg, P. J., Woodward, Jenks, Hooker and Gaynor, JJ., concurred.

Augustus Sachs, Appellant, v. George L. Rose, Respondent.—Judgment of the Municipal Court unanimously affirmed, with costs. No opinion. Present—Jenks, Hooker, Gaynor, Rich and Miller JJ.

Henry Sessler, Appellant, v. William R. H. Martin, Respondent.—We are of the opinion that the plaintiff had a right to put out and maintain signs upon the

leased premises, and, therefore, there was a question for determination by the trial court. Judgment of the Municipal Court reversed and new trial ordered, costs to abide the event. Jenks, Hooker, Gaynor, Rich and Miller, JJ., concurred.

J. Noyes Shaughnessy, Respondent, v. Arthur D. Weekes, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion. Present—Hirschberg, P. J., Woodward, Jenks, Rich and Miller, JJ.

Robert Wulff, an Infant, by Adolph Wulff, His Guardian ad Litem, Respondent, v. Fifth Avenue Coach Company, Appellant.—Order affirmed, with costs. No opinion. Jenks, Hooker, Gaynor, Rich and Miller, JJ., concurred.

Adolph Wulff, Respondent, v. Fifth Avenue Coach Company, Appellant.—Order affirmed, with costs. No opinion. Jenks, Hooker, Gaynor, Rich and Miller, JJ., concurred.

Franklin B. Lord, Respondent, v. The Equitable Life Assurance Society of the United States, Appellant, and Alfonso de Navarro and Others, Respondents.—Motion for leave to appeal to the Court of Appeals granted, and question certified. Present—Hirschberg, P. J., Woodward, Gaynor, Rich and Miller, JJ.

Louise Johnson, Respondent, v. The City of New York, The Automobile Club of America, Albert R. Shattuck and Others, Appellants.—Motion for leave to appeal to the Court of Appeals granted. Present—Hirschberg, P. J., Woodward, Gaynor, Rich and Miller, JJ.

William P. Hannan, Respondent, v. Kate B. Boldin, Appellant.—Judgment affirmed, with costs. No opinion. Hirschberg, P. J., Woodward, Jenks, Hooker and Gaynor, JJ., concurred.

Bertrand Kettell, Appellant, v. Ida F. Kettell, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion. Hirschberg, P. J., Woodward, Gaynor, Rich and Miller, JJ., concurred.

James V. Lawrence, Sole Surviving Member of the Firm of Lawrence Brothers, Appellant, v. William C. G. Wilson, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion. Hirschberg, P. J., Woodward, Gaynor, Rich and Miller, JJ., concurred.

The New York Central and Hudson River Railroad Company, Respondent, v. Catharine M. Lally and Others, Appellants.—Order reversed, with ten dollars costs and disbursements, and motion for stay of proceedings granted, with costs, but without prejudice to the right of the respondent to move for a vacation if the equity action brought by the appellants is not prosecuted with due diligence. No opinion. Hirschberg, P. J., Woodward, Gaynor, Rich and Miller, JJ., concurred.

William B. Russlend, Appellant, v. Edwin A. Bridge and John W. Souter, Respondents.—Order affirmed on argument, with ten dollars costs and disbursements. Hirschberg, P. J., Woodward, Gaynor, Rich and Miller, JJ., concurred.

Mary C. Ball, Plaintiff, v. Flexman E. Ball, Defendant.—Motion to open default denied. Present—Hirschberg, P. J., Woodward, Gaynor, Rich and Miller, JJ.

David Berkowitz, Appellant, v. Chicago, Milwaukee and St. Paul Railway Company and the New York Central and Hudson River Railroad Company, Respondents.—Motion for reargument as to the respondent the New York Central and Hudson River Railroad Company granted, and case set down for Tuesday, February 27, 1906. Present—Hirschberg, P. J., Jenks, Hooker, Rich and Miller, JJ.

Daniel R. Chichester, Respondent, v. Winton Motor Carriage Company, Appellant.—Motion to dismiss appeal denied. Present—Hirschberg, P. J., Woodward, Gaynor, Rich and Miller, JJ.

Frank E. Coles, as Executor, etc., Respondent, v. Charles G. A. Graburn, Appellant.—Motion to open default denied. Present—Hirschberg, P. J., Jenks, Hooker, Rich and Miller, JJ.

Margaret E. Haulon, Respondent, v. Central Railroad Company of New Jersey, Appellant.—Motion for leave to appeal to the Court of Appeals denied. Present—Hirschberg, P. J., Jenks, Hooker, Rich and Miller, JJ.

Willett Hicks, Respondent, v. Loring J. Eggleston and Others, Appellants.—Order resettled and signed as ordered by the plaintiff. Present—Hirschberg, P. J., Woodward, Gaynor, Rich and Miller, JJ.

In the Matter of the Application of the Brooklyn Bar Association to Punish Benjamin F. Chadsey, an Attorney.—Ordered that he be removed from the



App. Div.]

Second Department, January, 1906.

office of attorney and counselor at law, and his name stricken from the roll. Present—Hirschberg, P. J., Woodward, Gaynor, Rich and Miller, JJ.

In the Matter of the Application of Frank L. Froment and Another, etc.—Order resettled, so as to grant costs of the appeal as well as costs on the dismissal of the proceeding. Present—Hirschberg, P. J., Woodward, Gaynor, Rich and Miller, JJ.

In the Matter of the Application of the Board of Rapid Transit Railroad Commissioners for the City of New York for the Appointment of Three Commissioners to Determine and Report Whether a Rapid Transit Railway or Railways for the Conveyance and Transportation of Persons and Property, as Determined by the Board, Ought to Be Constructed and Operated. Thirty-fourth Street Route in the County of Queens.—Order designating newspapers for publication of notice signed. Present—Hirschberg, P. J., Woodward, Gaynor, Rich and Miller, JJ.

In the Matter of the Application for the Removal from Office of William W. Whyard, a Justice of the Peace of the Town of Orangetown, Rockland County, New York.—Motion to dismiss denied, and proceedings referred to Hon. John J. Beattie, Warwick, N. Y., to hear and report, with his opinion. Present—Hirschberg, P. J., Woodward, Jenks, Rich and Miller, JJ.

Edward A. Gott, Respondent, v. Brooklyn Heights Railroad Company, Appellant.—Motion to resettle order denied. Present—Hirschberg, P. J., Woodward, Gaynor, Rich and Miller, JJ.

Minnie Guth, Respondent, v. Joseph Barth, Appellant.—Motion for a stay denied. Present—Hirschberg, P. J., Woodward, Gaynor, Rich and Miller, JJ.

New York Mortgage and Security Company, Plaintiff, v. Concourse Park Hotel Company, Defendant.—Motion denied. Present—Hirschberg, P. J., Woodward, Gaynor, Rich and Miller, JJ.

Ahl Peace, Respondent, v. William McAdoo, as Police Commissioner, etc., Appellant.—The provision of the charter upon which the determination of this controversy depended having been amended since the action was brought,\* we do not think it is proper to grant leave to appeal to the Court of Appeals. The motion is, therefore, denied. Present—Hirschberg, P. J., Jenks, Hooker, Rich and Miller, JJ.

Thomas E. Pearsall and Others, Respondents, v. Thomas H. Stewart and Ella F. Stewart, Appellants.—Motion for leave to amend printed case on appeal granted. Present—Hirschberg, P. J., Woodward, Gaynor, Rich and Miller, JJ.

The People of the State of New York ex rel. Thomas Archer, Relator, Respondent, v. William McAdoo, as Police Commissioner, etc., Appellant.—Motion to resettle order granted. Present—Hirschberg, P. J., Jenks, Hooker, Rich and Miller, JJ.

Samuel Tierstein, Respondent, v. Max Glassberg, Appellant.—Motion denied. Present—Hirschberg, P. J., Woodward, Gaynor, Rich and Miller, JJ.

The Town of Oyster Bay v. William H. Jacob, Impleaded, etc., and Others.—Motion for leave to appeal to the Court of Appeals denied. Present—Hirschberg, P. J., Woodward, Gaynor, Rich and Miller, JJ.

George M. Whitehouse, Respondent, v. Staten Island Water Supply Company, Appellant.—Motion for leave to appeal to the Court of Appeals denied. Present—Hirschberg, P. J., Woodward, Gaynor, Rich and Miller, JJ.

Julienne C. Williams, Respondent, v. Metropolitan Life Insurance Company, Appellant.—Motion for reargument denied. Present—Hirschberg, P. J., Woodward, Gaynor, Rich and Miller, JJ.

Samuel Barnett and Florence Barnett, Respondents, v. The J. B. Sparrow Theatrical and Amusement Company, Limited, Appellant.—Judgment of the Municipal Court affirmed, with costs. No opinion. Hirschberg, P. J., Woodward, Jenks, Hooker and Gaynor, JJ., concurred.

Mathilda A. Bengston, Respondent, v. Daniel Swanston, Appellant.—Judgment of the Municipal Court modified by striking out the provision allowing the ten dollars costs, and as modified affirmed, without costs. No opinion. Jenks, Hooker, Rich and Miller, JJ., concurred.

Philip Brandmeier, Respondent, v. Demuth Glass Manufacturing Company, Impleaded, etc., Appellant.—Judgment of the Municipal Court reversed and

\* See *Peace v. McAdoo* (110 App. Div. 13); Laws of 1905, chap. 621, amdg. Greater N. Y. charter (Laws of 1901, chap. 466), § 315.—[REP.]

new trial ordered, costs to abide the event, on the ground that no proof of notice of dishonor was given, as required by statute.\* No opinion. Jenks, Hooker, Gaynor, Rich and Miller, JJ., concurred.

The Bank of Port Jefferson, Respondent, v. Mary A. Darling, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Hirschberg, P. J., Woodward, Gaynor, Rich and Miller, JJ., concurred.

Howard J. M. Cardeza and Others, Composing the Copartnership of Cardeza, Gilliams & Company, Appellants, v. William E. S. Griswold, as Trustee in Bankruptcy of John Osborn's Sons & Co., Respondent, Impleaded with Others.— Judgment, so far as appealed from, affirmed, with costs. No opinion. Hirschberg, P. J., Jenks, Hooker, Rich and Miller, JJ., concurred.

James M. Connelly, Respondent v. I. Henry Harris, Appellant.— Judgment of the Municipal Court reversed on the facts and new trial ordered, costs to abide the event. No opinion. Jenks, Hooker, Gaynor and Rich, JJ., concurred; Miller J., dissented.

Dirce Cornwell, by Frank W. Cornwell, Her Guardian ad Litem, Respondent, v. The East Rockaway Fire Department, Appellant.— The motion to set aside the nominal verdict, made on behalf of the defendant, was an inadvertence and unauthorized. The order is reversed, with ten dollars costs and disbursements, and the motion granted, without costs, this without prejudice to the right of the plaintiff to move for a new trial upon the minutes, if so advised. Hirschberg, P. J., Woodward, Gaynor, Rich and Miller, JJ., concurred.

Esther E. Daly, Respondent, v. Frederick W. Kister, Appellant.— Judgment of the Municipal Court affirmed, with costs. No opinion. Jenks, Hooker, Gaynor, Rich and Miller, JJ., concurred.

Gregorio Di Lorenzo, Respondent, v. Johanna Di Lorenzo, Appellant.— Order affirmed, without costs, upon the opinion of Mr. Justice Wilnot M. Smith at Special Term. Jenks, Hooker, Gaynor, Rich and Miller, JJ., concurred.

John B. Driscoll, Appellant, v. New York and Queens County Railway Company, Respondent.— Judgment and order of the County Court of Queens county unanimously affirmed, with costs. No opinion. Present — Jenks, Hooker, Gaynor, Rich and Miller, JJ.

Thomas Finucan, Appellant, v. Thomas T. Ramsden and Others, Respondents.— Judgment and order affirmed, with costs. No opinion. Jenks, Hooker, Gaynor, Rich and Miller, JJ., concurred.

First National Bank of the City of Brooklyn, Respondent, v. Helen M. Gridley, Appellant, Impleaded with Charles M. Coburn and Others.— Reargument ordered, and case set down for Tuesday, March 13, 1906.

Robert Gwynne, Jr., Appellant, v. Altonwood Park Company of New York, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Hirschberg, P. J., Woodward, Jenks and Rich, JJ., concurred.

E. Alexander Hand, Respondent, v. George W. Egbert, Appellant.— Judgment and order of the County Court of Kings county affirmed, with costs. No opinion. Jenks, Hooker, Gaynor, Rich and Miller, JJ., concurred.

Emil A. Hodes, Respondent, v. The City of New York, Appellant.— Judgment of the Municipal Court unanimously affirmed, with costs. No opinion. Present — Hirschberg, P. J., Woodward, Jenks, Hooker and Gaynor, JJ.

Elizabeth Hobby, Individually and as Executrix, etc., of Benjamin F. Hobby, Deceased, Respondent, v. Clinton D. Burdick, Appellant. Interlocutory judgment affirmed, with costs. No opinion. Jenks, Hooker, Gaynor, Rich and Miller, JJ., concurred.

Isaac McMunn Holly, Respondent, v. David Grinberg and Adolph Morris, Doing Business under the Name and Style of the Manhattan Storage Company, Appellants.— Judgment of the Municipal Court affirmed, with costs. No opinion. Jenks, Hooker, Gaynor, Rich and Miller, JJ., concurred.

In the Matter of the Probate of the Last Will and Testament of James Stanley Conner, Deceased. Peter T. Longworth and Others, Appellants; William H. Wray, as Executor, etc., of James Stanley Conner, Deceased, and Susan Leonard, Respondents.— Decree of the Surrogate's Court of Kings county affirmed, with costs. No opinion. Hirschberg, P. J., Woodward, Gaynor, Rich and Miller, JJ., concurred.

\* See Neg. Inst. Law (Laws of 1897, chap. 612), § 160 *et seq.*—[REP.]

App. Div.]

Second Department, January, 1906.

In the Matter of the Application of Francis Groppe, for Letters of Administration with the Will Annexed, etc., of John Groppe, Deceased, Respondent. Anna M. Meyers, Appellant.—Decree of the Surrogate's Court of Kings county affirmed, with costs. No opinion. Jenks, Hooker, Gaynor, Rich and Miller, JJ., concurred.

John Lenorak, an Infant, by Gottfried A. Metz, His Guardian ad Litem, Respondent, v. Jane E. Duffy, as Executrix, etc., of Terence J. Duffy, Deceased, Appellant.—Judgment and order affirmed, with costs. No opinion. Jenks, Hooker and Rich, JJ., concurred; Miller, J., dissented.

James McLoughlin, Respondent, v. The Board of Education of the City of New York, Appellant.—Judgment of the Municipal Court affirmed, with costs. No opinion. Jenks, Hooker, Gaynor, Rich and Miller, JJ., concurred.

John A. C. Nichols, Respondent, v. The City of New Rochelle, Appellant.—Judgment and order affirmed, with costs. No opinion. Hirschberg, P. J., Hooker, Rich and Miller, JJ., concurred; Jenks, J., adhered to the dissent expressed by him in 105 Appellate Division, 77.

Rosa North, Appellant, v. Samuel North, Respondent.—Judgment affirmed, without costs. No opinion. Hirschberg, P. J., Woodward, Rich and Miller, JJ., concurred.

David Nowak, Appellant, v. Mendel Barkas, Respondent.—Judgment of the Municipal Court affirmed, with costs. No opinion. Jenks, Hooker, Rich and Miller, JJ., concurred.

Abraham Nussbaum, Appellant, v. Brooklyn Ferry Company of New York, Appellant.—Order of the County Court of Kings county setting aside the verdict and granting a new trial affirmed, without costs. No opinion. Jenks, Gaynor, Rich and Miller, JJ., concurred; Hooker, J., voted to restore the verdict.

Leo Oppenheimer, as Trustee in Bankruptcy of the Estate of John McNamara, a Bankrupt, Appellant, v. John McNamara and Michael McNamara, Respondents.—Judgment unanimously affirmed, with costs. No opinion. Present—Hirschberg, P. J., Woodward, Jenks, Rich and Miller, JJ.

Susan A. Phelps, Respondent, v. John W. Phelps, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Hirschberg, P. J., Woodward and Miller, JJ., concurred; Jenks and Rich, JJ., voted to reduce the allowance for alimony.

Henry Rothman, Appellant, v. David Granat and the Empire State Surety Company, Respondents.—Judgment of the Municipal Court affirmed, with costs. No opinion. Jenks, Hooker, Gaynor, Rich and Miller, JJ., concurred.

Hans Triest, Plaintiff, v. The City of New York, Defendant.—Both parties ask for a reversal of the judgment. Judgment reversed, without costs. No opinion. Hirschberg, P. J., Jenks, Hooker, Rich and Miller, JJ., concurred.

Thomas Van Sant, Agent, etc., Respondent, v. Louis Heymann, Appellant.—Order of the Municipal Court affirmed, with costs. No opinion. Jenks, Hooker, Gaynor, Rich and Miller, JJ., concurred.

Thomas Van Sant, Agent, etc., Respondent, v. Henry M. Whitbeck, Appellant.—Order of the Municipal Court affirmed, with costs. No opinion. Jenks, Hooker, Gaynor, Rich and Miller, JJ., concurred.

William J. Wilson, Respondent, v. Charles Weissel, Appellant.—Judgment of the Municipal Court affirmed, with costs. No opinion. Jenks, Hooker, Gaynor, Rich and Miller, JJ., concurred.

John Zambetti and Frank Zambetti, Respondents, v. Charles Moder, Appellant.—Judgment of the Municipal Court affirmed, with costs. No opinion. Jenks, Hooker, Gaynor and Miller, JJ., concurred; Rich, J., dissented.

## FIRST DEPARTMENT, FEBRUARY, 1906.

Edwin Blum, on Behalf of Himself and All Other Stockholders of the Distilling Company of America, Similarly Situated, Appellant, v. Harry Payne Whitney, as Executor, etc., of William C. Whitney, Deceased, and Others, Respondents.

Appeal by the plaintiff from an interlocutory judgment, entered in the office of the clerk of the county of New York on the 18th day of September, 1905, sustaining demurrers to the third amended complaint.

PER CURIAM: We are all of opinion that the case of *Hutchinson v. Simpson* (92 App. Div. 882) is decisive of this appeal; but were it not for the controlling authority thereof Justices Laughlin and Clarke would dissent on the grounds stated in the dissenting opinion therein. It follows that the judgment should be affirmed, with separate bills of costs to the respondents appearing separately, with leave to plaintiff to serve an amended complaint within twenty days from the service of the order to be entered hereon, on payment of the costs in this court and in the court below. Present—Patterson, Ingraham, Laughlin and Clarke, JJ. Judgment affirmed, with separate bills of costs to respondents appearing separately, with leave to plaintiff to amend on payment of costs in this court and in the court below. Order filed.

Margaret Kelly and Margaret Kelly, as Administratrix, etc., of Duncan Kelly, Deceased, Appellants, v. Edward Ashforth and Others, Respondents.

*Undue influence—action to set aside conveyance of mortgages in trust because of undue influence—presumption of fraud.*

Appeal from a judgment entered upon the decision of the court at Special Term.—Judgment affirmed, with costs, on the opinion of the court below. (Reported in 47 Misc. Rep. 498.) Order filed. Present—O'Brien, P. J., Ingraham (concurring in opinion), Laughlin and Clarke, JJ.

INGRAHAM, J. (concurring): I concur in the affirmance of this judgment and generally in the opinion of the learned trial court. The plaintiffs, as representatives of the decedent, are not seeking to prevent the enforcement of an executory contract. They are seeking to set aside a transfer of property made in November, 1896, in trust for the benefit of the plaintiff's intestate and his wife during their lives, with a remainder over to the defendant Ashforth, on the ground that this arrangement was procured by undue influence exercised by Ashforth. The complaint alleged that the transfer of the property and the trust agreement were procured by Ashforth from Kelly "by means of undue influence, fraud and threats against the said Duncan Kelly," and "that the statement of the consideration for the execution of the said alleged trust agreement \* \* \* was a trick or device for the purpose of giving to said alleged trust agreement an appearance of validity, and for the purpose of inducing the said Duncan Kelly and the defendant The Farmers' Loan & Trust Company to believe that said alleged trust agreement was founded upon a valuable consideration," but in fact there was no consideration therefor. The evidence disclosed that this property, transferred to the Farmers' Loan and Trust Company in trust, consisting of two mortgages of the value of \$25,000, was the property of Duncan Kelly, who had a perfect right to do with it as he saw fit. He could have spent it, given it away, bequeathed it by a last will and testament, or treated it as any one has the power to treat his own property. He transferred the property to the Farmers' Loan and Trust Company by valid transfers, and at the same time there was executed a written agreement by which the trust company agreed to hold the bonds and mortgages upon certain trusts specified. There was no evidence that Kelly was not perfectly sane and in the full possession of all his faculties at the time he made this agreement; that he did not know what he was about, or did not intend to do just what he did, and for almost nine years after the trust was created he acquiesced in it, received the income from the trust property under the trust agreement, and never expressed any dissatisfaction with the arrangement. There was no evidence that this arrangement was suggested by the defendant Ashforth; that it was through his influence that Kelly transferred the property and executed the trust agreement, or that he had anything to do with the transaction, except that he was present at the time that the trust agreement was executed and

App. Div.]

First Department, February, 1906.

joined in its execution. There certainly was nothing in the situation, in the relations between Ashforth and Kelly, the acts of Ashforth in relation to the transaction, so far as they appeared on the trial, or from the provisions of the instrument itself, which raised a presumption of fraud; and there being no presumption of fraud, the burden was upon the plaintiffs to show that fraud or undue influence existed. The case being entirely bare of any such evidence, the plaintiff failed to establish any cause of action.

Melissa Walton Compton, Appellant, v. Charles Kenith Compton, Respondent.

*Contempt proceedings—failure to pay alimony—waiver of right to the amount granted in judgment.*

Appeal from an order made at Special Term denying a motion for an order adjudging defendant in contempt for non payment of alimony.

CLARKE, J.: On February 6, 1902, a final judgment was entered herein granting to the plaintiff an absolute divorce from the defendant. In said judgment it was also provided that the plaintiff should have the care, custody and control during his minority of the child of said parties, and that said defendant during the natural life of the plaintiff and during the minority, in case of her death, of the child, should contribute to the plaintiff the sum of twenty dollars per week for her support and the support, maintenance, care and education of said child, the first payment to be made January 24, 1902, and each week thereafter. It appears that at the time of the making of the motion herein the defendant was in default in the payments provided for in said judgment in the sum of \$2,840, and that the total paid under said judgment was \$106. It further appears that the child is now fifteen years of age and is living with, and is supported by, the plaintiff. Both parties have married again since the divorce. The Special Term denied the motion to adjudge the defendant in contempt. The judgment stands un-reversed, unappealed from and not modified. The default in payment is not denied. The plaintiff was entitled to proceed as for a contempt, and the order asked for should have been granted. The plaintiff, in her moving papers and in the brief submitted in her behalf, states that inasmuch as she has married again she does not desire any further personal support from the defendant, but that as the next friend of her and his minor child, she asks that the defendant be required to pay ten dollars a week for his education and support, and asks that if this court on this application has the power to modify the judgment accordingly, it do so. A party may voluntarily waive his rights, and this offer may be embodied in an appropriate order, said reduction to date from the issuance of the order to show cause herein. The order appealed from should be reversed, with ten dollars costs and disbursements, and the application to adjudge the defendant in contempt granted, with ten dollars costs. O'Brien, P. J., Patterson, Ingraham and Laughlin, JJ., concurred. Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

Lillie Beardsworth, Individually and as Administratrix, etc., of Alfred J. Whitehead, Deceased, Appellant, v. John L. Whitehead, Individually and as Surviving Partner of the Firm of Whitehead Brothers, and Others, Defendants, Impleaded with Ida Harnden, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Thomas Kirkwood, Respondent, v. Harry M. Smith, Individually and as Surviving Partner of C. S. Locke & Smith, and Rodman J. Pearson, Appellants, Impleaded with Another.—Judgment affirmed, with costs. No opinion.

The People of the State of New York ex rel. Thomas A. Burke, Relator, v. John N. Partridge, as Police Commissioner of the City of New York, Respondent.—Writ dismissed and proceedings affirmed, with costs. No opinion. (McLaughlin, J., dissenting.)

William H. Wade, as Administrator with the Will Annexed, etc., of Frances M. Way, Deceased, Appellant, v. Mutual Reserve Life Insurance Company, Respondent.—Judgment affirmed, with costs. No opinion.

The Mercantile National Bank of the City of New York, Respondent, v. Henry B. Sire, Appellant.—Judgment affirmed, with costs. No opinion.

Jacob Kissinger, Respondent, v. William Livingstone, Defendant, Impleaded with S. Harris Pomeroy, Appellant.—Judgment and order affirmed, with costs. No opinion.

First Department, February, 1906.

[Vol. 111.]

McVickar Gaillard Realty Company, Appellant, v. David J. Garth, Respondent.— Order affirmed, with costs, on the opinion of the court below.

Emily S. Haubner, Respondent, v. Metropolitan Street Railway Company, Appellant.— Judgment and order affirmed, with costs. No opinion. (Ingraham and Clarke, JJ., dissenting.)

Annie Gallagher, as Administratrix, etc., of Cormack Gallagher, Deceased. Respondent, v. Edgar B. Newman, Appellant.— Order affirmed, with costs. No opinion.

Alter Kushes, Appellant, v. Isidore Ginsberg, Respondent.— Judgment affirmed, with costs. No opinion.

In the Matter of John Smith, Deceased.— Order affirmed, with ten dollars costs and disbursements. No opinion.

The People of the State of New York ex rel. Herman J. Levy, Appellant, v. Edmond J. Butler, as Tenement House Commissioner of the City of New York, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion.

The People of the State of New York ex rel. Uvalde Asphalt Paving Company, Appellant, v. Edward M. Grout, as Comptroller, and William McKinney, as Auditor of Accounts, of the City of New York, Respondents.— Order affirmed, with ten dollars costs and disbursements. No opinion.

Amalia Friedmann, Respondent, v. Ramon Hotel Company and Judith Whittier, Appellants, Impleaded with Others.— Order affirmed, with ten dollars costs and disbursements. No opinion.

Eastman Kodak Company, Appellant, v. Julius L. Lewis, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion.

Helene Fitter and John Laue, Respondents, v. Edward Moroney and Emma Hiller, Appellants, Impleaded with William C. Rosenberg.— Order affirmed, with ten dollars costs and disbursements. No opinion.

Shepard N. Edmonds, Appellant, v. Attucks Music Publishing Company, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion.

Martin M. Goodman, Respondent, v. Montgomery Maze, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion.

David Heyman, Appellant, v. Leo Schlesinger, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion.

Jane Oakes and William A. Oakes, as Executors, etc., of William Hutchinson, Deceased, Respondents, v. Arthur L. Meyer and Jessie Meyer, Appellants.— Order affirmed, with ten dollars costs and disbursements. No opinion.

Louis Arkin v. Interborough Rapid Transit Company.— Motion denied, with ten dollars costs.

The People of the State of New York, Respondent, v. Richard M. Menzel, Appellant.— Motion to dismiss appeal granted.

The People of the State of New York, Respondent, v. David J. Dibol and Others, Appellants.— Motion to dismiss appeal denied, with leave to respondent to renew motion unless the case be placed on the calendar and the briefs filed for the March term of this court.

The People of the State of New York, Respondent, v. Harry Weisberg, Appellant, Impleaded.— Motion to dismiss appeal denied, with leave to respondent to renew motion unless the case be placed on the calendar and the briefs filed for the March term of this court.

The People of the State of New York, Respondent, v. George Kopp, Appellant.— Motion to dismiss appeal denied, with leave to respondent to renew motion unless the case be placed on the calendar and the briefs filed for the April term of this court.

The People of the State of New York, Respondent, v. Gaetano Gianvecchio, Appellant.— Motion denied.

The People of the State of New York, Respondent, v. Harrison G. Lamson, Appellant.— Motion to dismiss appeal granted.

In the Matter of the Account of Lydia M. Cowles, as Administratrix with the Will Annexed, etc., of William H. Morton, Deceased.— Motion to dismiss appeal granted, with ten dollars costs.

Mary Smith and Others, Respondents, v. Michael Ryan and Others, Appellants.— Motion denied, with ten dollars costs.

App. Div.]

First Department, February, 1906.

Edwin M. Jackson and Others, Respondents, v. Susan J. Ingalls, Impleaded, Appellant.— Motion to dismiss appeal granted, with ten dollars costs.

Henry S. Cavanaugh, Appellant, v. Oakleigh Thorne, Respondent.— Motion to dismiss appeal granted, with ten dollars costs.

The Sloss Iron and Steel Company, Appellant, v. Jackson Architectural Iron Works, Respondent.— Motion to dismiss appeal granted, with ten dollars costs.

Ida Tynberg, Respondent, v. The New York and Harlem Railroad Company and Others, Appellants.— Motion denied, with ten dollars costs.

Mt. Morris Bank, Respondent, v. The New York and Harlem Railroad Company and Others, Appellants.— Motion denied, with ten dollars costs.

Abraham Sarasohn, Appellant, v. Rebecca Kamaiky and Others, Respondents. Leon Kamaiky and Others, Respondents, v. Bertha Sarasohn, as Administratrix, etc., and Others, Appellants.— Motion denied, with ten dollars costs.

Marcella Sallie, as Administratrix, Appellant, v. New York City Railway Company, Respondent.— Motion denied, with ten dollars costs.

Annie Kragel, as Administratrix, Appellant, v. Samuel Green and Others, Respondents.— Motion denied, with ten dollars costs.

Harriet R. Robeson, Respondent, v. George Herzog, Appellant.— Motion denied, with ten dollars costs.

George J. Jetter and Others, Respondents, v. John Scollan, Appellant.— Motion granted upon plaintiffs stipulating that upon affirmance judgment absolute should be rendered against them.

John H. Conlen, Appellant, v. Rosanna Riser and Others, Defendants. Edward B. Corey, Purchaser, Respondent.— Motion denied, with ten dollars costs to Conlen and to Corey, appearing in opposition.

Angelus M. Sartorelli, Respondent, v. Mary V. Ezagui, etc., Appellant.— Motion to dismiss appeal denied, with ten dollars costs. See memorandum per curiam. Order filed.

Abraham A. Heller and Others, Respondents, v. William Methner and Others, Appellants.— Motion denied, with ten dollars costs, without prejudice to a renewal of the motion in this court in the event that the default be opened at the Special Term. See memorandum per curiam. Order filed.

Mary Lowry, as Administratrix, etc., Respondent, v. Interurban Street Railway Company, Appellant.— Motion denied upon payment of ten dollars costs, with leave to defendant to apply to the court below to open default. Order filed.

Ratje Bunke, Respondent, v. New York Telephone Company, Appellant.— Motion granted. Order filed.

Samuel V. Abel, Respondent, v. Henry Bischoff, Jr., and Others, Appellants.— Motion granted. Order filed.

Mishkind Feinberg Realty Company, Plaintiff, v. Louis Sidorsky, Defendant.— Motion denied, with leave to applicant as stated in memorandum per curiam. Order filed.

The People of the State of New York ex rel. Robert F. O'Connell, Relator, v. Nicholas J. Hayes, as Fire Commissioner of the City of New York, Respondent.— Writ dismissed and proceedings affirmed, with fifty dollars costs and disbursements. No opinion. Order filed.

The People of the State of New York ex rel. William A. Stoutenburgh, Relator, v. Nicholas J. Hayes, as Fire Commissioner of the City of New York, Respondent.— Writ dismissed and proceedings affirmed, with fifty dollars costs and disbursements. No opinion. Order filed.

George H. Lawrence and John Knewitz, as Executors, etc., of Elizabeth H. Sias, Deceased, Appellants, v. Arthur W. Sias, Individually and as Executor, etc., of Elizabeth H. Sias, Deceased, Respondent.— Judgment affirmed, with costs. No opinion. Order filed.

Mary E. Gedney, Respondent, v. Arthur W. Sias and Others, as Executors, etc., of Elizabeth H. Sias, Deceased, Appellants.— Judgment and order affirmed, with costs. No opinion. Order filed. (Ingraham, J., dissenting.)

Salvino Belotti, as Administrator, etc., of Maria G. Belotti, Deceased, Respondent, v. Metropolitan Street Railway Company, Appellant.— Judgment and order affirmed, with costs. No opinion. Order filed.

Emilie Kohm, as Administratrix, etc., of Adolph Kohm, Deceased, Appellant, v. Interborough Rapid Transit Company, Respondent.— Judgment affirmed, with costs. No opinion. (Laughlin, J., dissenting.) Order filed.

Second Department, February, 1906. [Vol. 111, App. Div.]

Rachel Green, as Administratrix, etc., of Charles Green, Deceased, Appellant, v. Urban Contracting and Heating Company and August Oppenheimer, Respondents.—Judgment affirmed, with costs. No opinion. (O'Brien, P. J., and Patterson, J., dissenting.) Order filed.

Denis McGuinness, Appellant, v. Allison Realty Company and Others, Defendants, Impleaded with the City of New York and Isaac A. Hopper, Respondents.—Judgment affirmed, with costs, with leave to plaintiff to amend on payment of costs in this court and in the court below. No opinion. Order filed.

Mary A. Gray, as Administratrix, etc., of Bernard Gray, Deceased, Appellant, v. Siegel Cooper Company, Respondent.—Judgment affirmed, with costs. No opinion. (Laughlin, J., dissenting on his former opinion.)\* Order filed.

The Strobbridge Lithographing Company, Respondent, v. Robert E. Johnston, Appellant, Impleaded with John S. Duss.—Order affirmed, with ten dollars costs and disbursements. No opinion. Order filed.

In the Matter of the Estate of Bridget Dooley, Deceased. Annie Dooley, as Administratrix, etc., of Bridget Dooley, Deceased, Appellant; Joseph F. Barker, Respondent.—Decree affirmed; with costs. No opinion. Order filed.

The People of the State of New York ex rel. John Dwyer, Appellant, v. Francis V. Greene, as Police Commissioner of the City of New York, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion. (Patterson and Laughlin, JJ., dissenting.) Order filed.

Leo Schlesinger, as Receiver of the Federal Bank of New York, Respondent, v. Simon Scheuer and Others, Copartners Composing S. Scheuer & Sons, Appellants, Impleaded with Others.—Order affirmed, with ten dollars costs and disbursements. No opinion. Order filed.

National Bank of Commerce in New York, Respondent, v. Leo Schlesinger, as Receiver of the Federal Bank of New York, Appellant, Impleaded with Frederick D. Kilburn, Individually and as Superintendent of Banks of the State of New York.—Order affirmed, with ten dollars costs and disbursements. No opinion. Order filed.

The People of the State of New York ex rel. George G. Brown, Jr., Appellant, v. William F. Baker and Others, Respondents.—Order affirmed, with ten dollars costs and disbursements. No opinion. Order filed.

Mary Smith and Others, Respondents, v. Michael Ryan and Thomas Lelane, as Surviving Executors of and Trustees under the Last Will and Testament of Mary M. Flynn, and Others, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion. Order filed.

B. Frank Sadler, Appellant, v. Julius Bohm and Rudolph Bohm, Respondents.—Order modified by requiring as a condition of opening default, in addition to motion costs allowed, the payment of thirty dollars trial fee, ten dollars term fee, and the disbursements of plaintiff on the inquest, without costs of appeal. No opinion. Order filed.

Sadie V. Brady, Respondent v. Daniel M. Brady, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Order filed.

## SECOND DEPARTMENT, FEBRUARY, 1906.

In the Matter of the Application of Charles C. Snyder for Admission to the Bar.—Application granted. Present—Woodward, Jenks, Hooker, Gaynor and Rich, JJ.

\* See 78 App. Div. 118, 123.—[REp.]



# In Memoriam.

---

**Proceedings had in the Appellate Division, Fourth Judicial Department, at an adjourned term on Thursday, the 12th day of July, 1906, Touching the Recent Death**

**of**

**The Honorable George Barker,**

**at one time**

**Presiding Justice of the General Term, Fifth Department, of the Supreme Court.**

---

A memorial to the late Justice **GEORGE BARKER**, formerly Presiding Justice of the General Term, was presented to the Appellate Division by a committee composed of Hon. Jerome B. Fisher, Hon. Frank W. Stevens and Frank H. Mott, appointed by the Chautauqua County Bar Association, as follows:

"The committee appointed by the Chautauqua County Bar to prepare and to present to the Appellate Division of the Supreme Court a suitable memorial to the late **GEORGE BARKER** respectfully submits the following:

"**GEORGE BARKER** was a member of the Constitutional Convention of 1867, and was District Attorney of Chautauqua County and a Justice of the Supreme Court of New York State. He displayed in the drama of life the most splendid attributes of man, lawyer and jurist.

"As a man he was possessed of a gracious personality, lofty character and unbending integrity. No breath of scandal touched him. The rectitude of his motives was never questioned, his example was of the finest. He rightly possessed the confidence, not only of his community, but of the State, and was in all relations a beautiful example of the man who lived a long life, inspired by high ideals and worthy purposes.

"As a lawyer he was diligent, laborious and faithful to the trust confided to him. His career at the bar was not long owing to his elevation at a comparatively early age to the bench, and was confined to the litigation common to a rural community fifty years ago. In it he proved himself a strong man and a just counselor.

"As a judge he was learned, able and diligent, giving to every case before him conscientious attention. He was especially kind to the younger members of the bar and thereby won for himself a place in the affection of all. His ideal was to do his full duty in every relation of life and to that end he strove unceasingly.

"In his later years he bore severe affliction with uncomplaining sweetness of spirit.

"For him we have only words of praise and affection. In his life an example of whatever was noble and upright he has now passed to his final rest at a ripe age leaving behind him a memory which we shall cherish as an inspiration."

Justice Spring, on behalf of the court, made the following reply:

"Judge BARKER was a leading lawyer of Chautauqua county before his accession to the bench. He had been district attorney of that county and a member of the Constitutional Convention of 1867. In that body of eminent men the abilities of Judge BARKER were recognized and he was one of its influential members. He served as Justice of the Supreme Court for twenty-eight years and both at Circuit and General Term fulfilled the duties devolving upon him with conspicuous ability and fidelity. His courtesy, affability and charming personality are fittingly set forth in the memorial presented on behalf of the bar of his county. He was an industrious, painstaking jurist, with a high conception of his judicial duties. He looked primarily for the right in every case and bent every energy to reach a correct result. As Presiding Justice of the General Term he was courteous, dignified and attentive to every detail.

"As is stated in the memorial presented, he was always cordial to the younger members of the bar, was willing to overlook technical errors in their papers and by valuable suggestions aid in their correction, but quick to condemn trickery or any deflection from the strictest rectitude. He was of lovable, kindly disposition and yet a man of intense convictions and earnestness. Judge BARKER was a country lawyer, but free from provincialism, of broad liberal tendencies, keeping pace with the events of the day and an acute student of public affairs. He detested sham and pretense; was circumspect in his conduct and devoted to the legal profession.

"The memorial presented will be spread upon the minutes of the court and a copy transmitted to the official reporter for publication in the reports."

# In Memoriam.

---

Proceedings had in the Appellate Division, Fourth Judicial Department, at the Close of Court, on Thursday, the 17th day of May, 1906, Touching the Recent Death

of

**The Honorable Henry A. Childs,**  
Justice of the Supreme Court of the Eighth District.

---

By Mr. J. P. Varnum, president of the Rochester Bar Association: "If the Court please:

"I rise to announce formally to this court the death of Honorable HENRY A. CHILDS, a Justice of the Supreme Court for the Eighth Judicial District in this department, who died suddenly at his home in Medina on the morning of yesterday.

"Mr. Justice CHILDS had occupied a seat upon the bench of the Supreme Court for a period of more than twenty-two years, during which he has added lustre to the bench and has adorned the administration of justice by qualities of intellect and heart that have commanded the respect and admiration of his brethren of the bench, of the members of the bar of this department, and of the public which he served.

"By his conduct in the discharge of all his judicial duties he gained and has held, without interruption, the esteem and the affection of all who were brought into official or personal relations with him. He was eminent as a judge; as a man he was admired and loved.

"It seems fitting that upon his death such action should be taken by the bar of this department and by this court as shall evidence and record the estimation in which he is held by them and pay to him that tribute of honor and respect he so well deserves, for duty ably, faithfully and conscientiously done. I, therefore, move that this court cause to be placed upon its records such memorial of the late Mr. Justice CHILDS as it shall be pleased to direct, and take such other action as it shall deem appropriate."

Mr. Joseph W. Taylor, of the Rochester bar, seconded the motion of Mr. Varnum in the following language:

"In seconding Mr. Varnum's motion, I wish to add a few words upon the death that has made occasion for it.

"Death, the most inevitable fact of human experience, attracts but little attention, causes but little comment, save when it comes to those who occupy some conspicuous place in some large field of human activity. In such instances it is fitting that tribute be paid to, and that record be made of the estimation in which those distinguished dead were held by their associates and contemporaries.

"This surely was such an instance. Judge CHILDS was an able, fearless, upright judge. Above and beyond that, he was a courageous, resolute, manly man. He performed admirably the duties of his exalted office. No taint or blemish ever marred his official fame. He performed equally well the multifarious but less conspicuous duties of life. He, doubtless, had his infirmities; who has not? They, however, as is right, will soon be forgotten; but by his virtues, his high character, his lofty ideals, he has erected for himself an enduring monument and set a standard beyond the reach of all save those molded in the same manly form. For the thoughts, the words, the deeds of such men as he there is no death. The sphere of their influence goes on, widening forever. They bud, they blossom, they bear fruit from age to age."

Whereupon, Presiding Justice McLENNAN, in behalf of the court, said:

"Each member of this court was greatly shocked to learn of the death of Justice CHILDS, of which formal announcement has just been made.

"We think the suggestion eminently proper and fitting that a minute should be entered upon the records of this court expressive of the high regard in which the deceased was held by his associates and by the bar of this judicial department.

"Justice HENRY A. CHILDS died at his home in Medina on the morning of May 16, 1906, in his seventieth year. He had served as a justice of the Supreme Court for nearly a quarter of a century, and as such he was best known. In the discharge of the duties of that office he has reared a monument unto himself enduring as time, and which proclaims his greatness more forcefully than can any words. He indeed was a great lawyer, a great judge, a great man — independent, fearless, honest, genial, helpful, lovable. Appropriate indeed that the bar of this judicial department should pay a tribute of respect to the memory of such a man.

"Each member of this court mourns the death of a dear and greatly beloved friend.

"This minute will be entered upon the records of this court, together with the remarks of Mr. Varnum and Mr. Taylor, and as a further tribute of respect to the memory of our deceased brother, this court will be adjourned until Monday next."

# INDEX.

---

## **ABANDONMENT.**

Of husband or wife.

*See* HUSBAND AND WIFE.

## **ACCIDENT.**

Insurance against.

*See* INSURANCE.

Resulting from negligence.

*See* NEGLIGENCE.

## **ACCOUNTING.**

Corporate bonds — when president of corporation has sufficiently accounted for bonds received for sale — delivery of bonds to other officer for sale.

*Owego Gas Light Co. v. Boyer*, 140.

By executors and administrators.

*See* EXECUTOR AND ADMINISTRATOR.

Between partners.

*See* PARTNERSHIP.

By trustee.

*See* TRUST.

## **ADMINISTRATOR.**

*See* EXECUTOR AND ADMINISTRATOR.

## **ADOPTION.**

*See* PARENT AND CHILD.

## **AFFIDAVIT.**

*See* DEPOSITION.

## **AFFINITY.**

*See* PEDIGREE.

## **ALIMONY.**

*See* HUSBAND AND WIFE.

## **APPEAL.**

Mechanic's lien on public improvement — undertaking to discharge lien may be signed by assignee of contractor — Lien Law construed — when leave to submit new undertaking does not bar appeal from decision holding former bond to be insufficient.

*Matter of Hudson Water Works*, 860.

Municipal corporations — condemnation proceedings for street opening in city of New York — no appeal from order of Special Term sending back report to commissioners for correction.

*Matter of Commissioner of Public Works*, 285.

Municipal Court of New York — order opening default not reviewable on appeal from judgment which has been vacated.

*Wendin v. Brooklyn Heights R. R. Co.*, 390.

## **APPOINTMENT.**

Power of.

*See* POWER.

## **APPRAISEMENT.**

Of value of stock.

*See* TAX.

**ARREST.**

Action for goods obtained by false representation — when right to arrest may be established by affidavits, though verification of complaint defective.

*Voorhees Rubber Manufacturing Co. v. McEwen*, 541.

**ASSAULT AND BATTERY.**

Evidence of what plaintiff's daughter, not present at assault, said to one joint defendant not admissible — hearsay.

*Tracey v. Reid*, 896.

**ASSESSMENT.**

For municipal works.

See MUNICIPAL CORPORATION.

For the purpose of taxation.

See TAX.

**ASSIGNMENT.**

Sale — conversion — secured debt sold as worthless by assignee for benefit of creditors — mutual mistake of fact — error in excluding evidence that purchaser did not know debt was secured — when sale should be rescinded because minds of parties have not met — counterclaim asking rescission requires reply.

*Flynn v. Smith*, 870.

Injunction *pendente lite* — when assignee of lease entitled to injunction to restrain landlord from interfering with his possession — complaint insufficient which fails to allege facts showing remedy at law is inadequate — affidavits insufficient.

*Goldman v. Corn*, 674.

Deed — action to set aside conveyance and assignment made by devisee — fraudulent representations by grantee — evidence sufficient to establish legitimacy and title of grantor.

*Cramsey v. Sterling*, 568.

To be void if note given as consideration therefor is not paid — rights of second assignee where such note is not paid.

*Geneva Mineral Springs Co., Limited, v. Steele*, 706.

Measure of damages when mortgagee assigns part interest in bid before loss by fire.

*Uhlfelder v. Palatine Insurance Co., Limited*, 57.

Parol assignment of written contract — when assignee can recover thereon — erroneous charge.

*St. Regis Paper Co. v. Page Lumber Co.*, 108.

Of mortgage.

See MORTGAGE.

**ASSOCIATION.**

Negligence — membership corporation liable for personal injuries received through negligence of its servants — evidence — statement of member of such corporation to accident insurance company that he was being carried home not conclusive.

*Beecroft v. New York Athletic Club*, 392.

See CORPORATION.

For insurance.

See INSURANCE.

**ASSUMPTION OF RISK.**

See NEGLIGENCE.

**ATTORNEY AND CLIENT.**

1. *Contract for contingent fee sustained — evidence.* Clients who after retaining an attorney have discharged him and substituted other attorneys, and thereafter finding that his services are necessary by reason of his special fitness have re-employed him under written contracts giving him a contingent fee, cannot thereafter complain that he drove a hard bargain. Deductions from the amount due are not proper merely because the case was tried in court by the other attor-

**ATTORNEY AND CLIENT** — *Continued.*

neys employed, as the labor of the preparation of a case may be greater than the trial thereof. *Burke v. Baker*, 422.

2. *Diary of deceased attorney admissible to show services rendered.* When such attorney is dead it is not error to admit his diaries in evidence to show the services rendered. *Id.*

3. *Proof insufficient to show retainer by wife when brought in as party defendant in suit against husband.* Action by attorneys for professional services.

When attorneys have been employed by a husband to defend an action, and, on the wife being brought in as a party defendant, are told by the husband in the wife's presence "to go ahead and defend her," to which statement she made no reply, proof of such fact is insufficient to show a retainer by the wife, especially when the services rendered to the wife were incidental to the defense of the action against the husband. *Altkrug v. Horowitz*, 420.

4. *Evidence—objection to narration by witness.* An objection to a narration by a witness is good; for counsel have a right to have testimony brought out by question and answer in order to protect the client's interest by objection rather than by motion to strike out. *Id.*

5. *Power of surrogate to order reference to determine amount of attorney's compensation for services to executors.* A surrogate has power, under section 66 of the Code of Civil Procedure, upon petition, to determine the value of services rendered by an attorney to executors and to charge the same as a lien upon the estate. To that end he may appoint a referee to take testimony and report the value of said services. *Matter of Smith*, 23.

6. *Compensation of attorney lien upon estate.* Although executors are primarily personally liable for the services of an attorney, yet such services, when necessary, are chargeable as a lien upon the estate.

The Appellate Division will confirm the findings of such referee and surrogate as to the value of such services when the findings are not against the weight of the evidence. *Id.*

7. *Personal judgment not authorized in such proceedings.* When it is found by the surrogate that the services of an attorney are chargeable as a lien upon the estate there is no authority to direct a personal judgment and execution against the executor as in a common-law action. *Id.*

8. *Substitution of attorneys—attorney retaining lien on papers until payment.* Although a client has an absolute right to substitute attorneys, an attorney not guilty of misconduct should be allowed to retain his client's papers on such substitution until the amount due him is ascertained by reference and is paid. *Anglo-Continental Chemical Works, Limited, v. Dillon*, 418.

Conversion — when complaint states cause of action for conversion — when question as to whether moneys were turned over for investment or as loan is for the jury — when written evidence not conclusive.

*Sinclair v. Higgins*, 206.

Bills and notes — evidence insufficient to show an indorsement to be without recourse — direction of verdict — effect of failure to claim but one question as proper for jury.

*Wood v. Rairden*, 303.

Divorce — temporary alimony not proper while prior award of alimony in action for separation stands — excessive counsel fees.

*Schmalholz v. Schmalholz*, 543.

Contempt — order to show cause must be served personally — relief not asked in motion papers cannot be granted.

*Matter of Weeks v. Coe*, 337.

Attorney's lien on settlement by client — no lien for costs.

*Oishi v. Metropolitan Street R. Co.*, 912, 913.

**BANKING.**

Gift — when gift of savings bank deposit is in trust to pay over to beneficiaries.

*Mann v. Shrive*, 412.

Beneficiaries — societies for purpose of insurance.

*See* INSURANCE.

**BANKING—Continued.**

Bill of lading — generally.  
*See* CARRIER.

Bill of particulars.  
*See* PLEADING.

**BILLS AND NOTES.**

1. *Evidence insufficient to show an indorsement to be without recourse.* When a client in settling a dispute with her attorney as to the compensation due him has turned over to him indorsed in blank a promissory note of which she was the payee, and has also given her own note for the balance, she is liable on her indorsement when such note goes to protest. A claim that it was agreed that her indorsement was to be without recourse is not substantiated by testimony by the defendant that the attorney gave a receipt "without any restrictions \* \* \* in consideration of payment, and told me so, and would give me a receipt in full without any restrictions, and I consider the bill was paid." *Wood v. Bairden*, 808.

2. *Direction of verdict.* On such testimony a verdict for the holder should be directed. *Id.*

3. *Effect of failure to claim but one question as proper for jury.* A statement by a party that he wishes to go to the jury on a specific question followed by a mere exception to the direction of a verdict, waives the presentation to the jury of any question save the one stated. *Id.*

Conditional sale — when goods are retaken by vendor the consideration of notes given for purchase price fails — vendor not entitled to apply proceeds of sale of goods on notes — retaking of property inconsistent with affirmation of sale.

*Cooper v. Payne*, 785.

Crime — uttering forged note — knowledge of defendant — evidence — error in excluding communications made to defendant as to general character of note — when error to admit evidence of other unrelated forgeries.

*People v. Dolan*, 600.

Preferred cause — when action by receiver of corporation entitled to preference

*Schlesinger v. Gilhooly*, 158.

Injunction to restrain sale of collateral security — when remedy at law adequate.

*Ehrlich v. Grant*, 196.

Trust — when foreign judgment that note has outlawed is binding here.

*Blair v. Cargill*, 853.

**BOARD OF SUPERVISORS.**

*See* COUNTY.

**BOARDS OF MUNICIPALITIES.**

*See* MUNICIPAL CORPORATION.

**BOND.**

Mechanic's lien on public improvement — undertaking to discharge lien may be signed by assignee of contractor — Lien Law construed — when leave to submit new undertaking does not bar appeal from decision holding former bond to be insufficient.

*Matter of Hudson Water Works*, 860.

Life insurance corporation — when sale of assets to other corporation valid — when Superintendent of Insurance not personally liable for allowing substitution of bonds deposited in his department.

*Raymond v. Security Trust & Life Insurance Co.*, 191.

**BOOKS AND PAPERS.**

Inspection of.

*See* DISCOVERY.

As evidence.

*See* EVIDENCE.

**BROKER.**

*See* PRINCIPAL AND AGENT.



**BRIDGE.**

Negligence — liability of city for injuries received through collapse of bridge over excavation in sidewalk.

*Parks v. City of New York*, 836.

**BURDEN OF PROOF.**

See EVIDENCE.

**CALENDAR.**

1. *Preferred cause* — when action by receiver of corporation entitled to preference. The receiver of a bank suing on promissory notes should be granted a preference on the calendar, although there has been delay in bringing action and in noticing the cause for trial, when the receiver has been ordered to make a final accounting and the trial of the action is necessary to enable the receiver to comply with the order of the court. *Schlesinger v. Gilhooly*, 158.

2. *Preferred cause* — husband failing to pay alimony not entitled to preference in action for divorce. A husband who has been ordered to pay temporary alimony and counsel fees in an action for divorce and has failed to do so is not entitled to move for a preference under section 791, subdivision 13, of the Code of Civil Procedure. *Fennessy v. Fennessy*, 181.

3. *Payment of award*. When a counsel fee is awarded, the wife is entitled to have it paid a reasonable time before the trial to the end that she may have her case properly prepared. *Id.*

**CARRIER.**

1. *No recovery on common-law liability of carrier, under complaint setting out breach of express contract*. A plaintiff suing for the breach of an express contract of a carrier to carry and deliver goods, who fails to prove said contract, cannot recover on the common-law liability of the carrier when such issue is not within the pleadings.

A defendant is not required to meet trial issues not presented.

The failure to prove the contract alleged is not a mere variance which allows a judgment based on the common-law liability of the carrier when no motion to amend is made at trial. *Rosenfeld v. Central Vermont R. Co.*, 371.

2. *Recovery for tort not proper under complaint on contract* — failure to show conversion. Such complaint setting out the breach of an express contract to carry does not authorize a judgment in tort under an allegation that "the defendant appropriated the said case of goods to its own use and benefit in disregard of the said agreement," when there is no proof of such conversion. Non-delivery without proof of wrongful disposition or withholding of property does not establish conversion. *Id.*

3. *Of goods* — bill of lading constitutes contract. The receipt or bill of lading issued by a common carrier of goods constitutes the contract between the parties, and the shipper who receives it without objection is bound by the terms thereof in the absence of misrepresentation, fraud or concealment of the carrier. *Hoffman v. Metropolitan Express Co.*, 407.

4. *Erroneous charge*. Hence, in an action by the shipper to recover for injury to goods, it is error to charge, in substance, that the plaintiff is not bound by clauses in such bill of lading restricting the carrier's liability, if the plaintiff did not know of said terms and no steps were taken by the carrier to bring the same to her knowledge. Nor is such error cured by a subsequent charge ruling that the question of the plaintiff's knowledge of the terms depended upon the exercise of "due care" in apprising herself thereof. *Id.*

5. *Influence on verdict*. As the jury may have found for the plaintiff by reason of such erroneous charge, it is immaterial that the delivery of such receipt was in issue, or that the plaintiff contended that there was an oral contract by the carrier to transport the goods without rehandling. There can be no certainty that the verdict was based on these latter issues. *Id.*

6. *Evidence* — statements of carrier's servant made after delivery of goods inadmissible. It is error to admit evidence of statements made by the carrier's employee after the delivery of the property to the effect that the goods were not in good condition when delivered. *Id.*

**CASE.**

On appeal.

*See* APPEAL.**CERTIFICATE.**

Issued under Liquor Tax Law.

*See* INTOXICATING LIQUOR.**CERTIORARI.**

1. *To review dismissal of police officer — dismissal upheld — evidence.* When, on certiorari to review the proceedings of a police commissioner in discharging the relator from the police force, it appears that the relator's only excuse for failing to report to the station house by telephone, as required by the rules, and for returning drunk the following morning was that he drank whisky to relieve an alleged interstitial nephritis, the proven neglect of duty warrants the dismissal. *People ex rel. Walters v. Lewis*, 375.

2. *When cross-examination as to past record is admissible.* It is not reversible error to compel such police officer to testify on cross-examination that he had been tried several times and found guilty on similar charges. And whether error or no, when the police commissioner certifies that the relator's discharge was based on his last dereliction, and not on his past record, his determination will be upheld.

*It seems*, that the strictest technicalities of evidence are not to be required at administrative trials when the presiding officer is not a common-law lawyer or judge. *Id.*

3. *Return conclusive even though error admitted by respondent.* The return of the State Civil Service Commission on certiorari is conclusive even though the counsel for the respondent admits that it is not in accord with the facts. *People ex rel. Melody v. Pound*, 395.

4. *Further return is proper remedy.* The remedy to correct such error is by a further return under section 2135 of the Code of Civil Procedure. *Id.*

Liquor Tax Law — when certiorari refused to review right of Commissioner of Excise to make enumeration of inhabitants of city and to increase cost of liquor tax certificate.

*People ex rel. Flinn v. Cullinan*, 32.

Municipal corporations — certiorari to review assessment for sewer in city of Utica — assessment confirmed.

*People ex rel. Keim v. Desmond*, 757.

To review proceedings, generally.

*See* APPEAL.**CESTUI QUE TRUST.***See* TRUST.**CHARGE.**

In negligence cases.

*See* NEGLIGENCE.

Of the judge.

*See* TRIAL.

Upon lands devised.

*See* WILL.**CHATTEL MORTGAGE.***See* MORTGAGE.**CHILD.***See* PARENT AND CHILD.**CHURCH RECORDS AS EVIDENCE.***See* EVIDENCE.**CITY.***See* MUNICIPAL CORPORATION.

**CIVIL SERVICE.**

Municipal corporations—civil service rule of city of New York requiring six months' service before admission to examination for promotion is constitutional—mandamus to compel admission to such examination before such service refused.

*Matter of Rickotts*, 869.

**CLAIM.**

Against a decedent's estate.

See EXECUTOR AND ADMINISTRATOR.

**CLUBS.**

See ASSOCIATION.

**CODE OF CIVIL PROCEDURE.**

§ 66—Power of surrogate to order reference to determine amount of attorney's compensation for services to executors.

*Matter of Smith*, 23.

§ 405—Practice—action on life insurance policy—error to dismiss complaint because answer sets out short Statute of Limitations—prior action in County Court discontinued because of lack of jurisdiction—when such discontinuance voluntary under section 405 of the Code of Civil Procedure—when running of Statute of Limitations stopped during such prior action.

*Bannister v. Michigan Mutual Life Insurance Co.*, 765.

§§ 452, 488, 498, 499—Parties—objection to defect of parties defendant must be taken by demurrer or answer—proper practice stated—objection cannot be made by motion.

*Knickerbocker Trust Co. v. Oneonta, C. & R. S. R. Co.*, 812.

§ 535—Libel—complaint—general allegation that libel referred to plaintiff—Code of Civil Procedure, section 535, construed—when complaint containing general allegation will be sustained on demurrer.

*Nunnally v. Tribune Association*, 485.

§ 535—Libel—when complaint with allegation that libel referred to plaintiff is not demurrable.

*Nunnally v. New-Yorker Staats-Zeitung*, 482.

§ 557—Arrest—action for goods obtained by false representation—when right to arrest may be established by affidavits, though verification of complaint defective.

*Voorhees Rubber Manufacturing Co. v. McEwen*, 541.

§ 603—Injunction *pendente lite*—when assignee of lease entitled to injunction to restrain landlord from interfering with his possession—complaint insufficient which fails to allege facts showing remedy at law is inadequate—affidavits insufficient.

*Goldman v. Corn*, 674.

§ 791, subd. 13—Preferred cause—husband failing to pay alimony not entitled to preference in action for divorce.

*Fennessy v. Fennessy*, 181.

§ 829—Conversations of messenger with deceased owner of stock excluded.

*Hall v. Wagner*, 70.

§ 834—Evidence—privilege of communications to physician not waived by taking deposition of such physician—privilege of physician can only be waived in open court or by stipulation.

*Clifford v. Denver & Rio Grande Railroad Co.*, 513.

§§ 870, 872, 873—Deposition—examination of officer of corporation—Code of Civil Procedure, §§ 870, 872, 873 and rule 82, construed—matters not a defense to such application—laches no bar.

*Goldmark v. U. S. Electro-Galvanizing Co.*, 526.

§ 911—Evidence—privilege of communications to physician not waived by taking deposition of such physician—privilege of physician can only be waived in open court or by stipulation.

*Clifford v. Denver & Rio Grande Railroad Co.*, 513.

**CODE OF CIVIL PROCEDURE — Continued.**

§ 1019 — Reference to take accounts of assignee for benefit of creditors — report filed after death of assignee should be returned to referee — election of administratrix and sureties of assignee to end reference.

*Matter of Venable*, 508.

§ 1022 — Annulment of marriage — marriage annulled when wife is under age of legal consent — woman may sue under section 1743 of the Code of Civil Procedure — decree — short form not proper.

*Wander v. Wander*, 189.

§ 1205 — Parties defendant — under complaint against joint defendants judgment may be had against one only.

*Lawton v. Partridge*, 8.

§§ 1627, 1628 — Mortgage — assignor of mortgage who guarantees payment proper party on foreclosure — no action against such assignor for deficiency without leave of court — complaint not showing leave of court fails to state cause of action.

*Robert v. Kidansky*, 475.

§ 1671 — *Lis pendens* — when not canceled in action to set aside conveyance — plaintiff's right to relief not determined on affidavit — when deposit of money may be made.

*Wolinsky v. Okun*, 536.

§ 1671 — *Lis pendens* — Code of Civil Procedure, section 1671, construed — specific performance — when *lis pendens* not canceled in such action.

*Tishman v. Acritelli*, 237.

§ 1674 — *Lis pendens* — right thereto determined by complaint — when cancellation of *lis pendens* refused — merits of action not determined on motion to cancel *lis pendens*.

*Lindheim & Co. v. Central Nat. Realty & Construction Co.*, 275.

§§ 1742, 1743 — Annulment of marriage — marriage annulled when wife is under age of legal consent — woman may sue under section 1743 of the Code of Civil Procedure — decree — short form not proper.

*Wander v. Wander*, 189.

§ 1757, subd. 2 — Divorce — when correspondent appearing in action not entitled to retrial of issues.

*Boller v. Boller*, 240.

§ 1785 — Corporation — action by stockholder to dissolve corporation and set aside prior voluntary dissolution — complaint — failure to state cause of action — when directors not necessary parties defendant.

*Knickerbocker v. Groton Bridge & Manufacturing Co.*, 145.

§ 1832 — Consent that claim against estate be determined by surrogate — when action on claim barred by such consent.

*Clark v. Scovill*, 35.

§ 2135 — Certiorari — return conclusive even though error admitted by respondent — further return is proper remedy.

*People ex rel. Melody v. Pound*, 395.

§ 2286 — Executors — decree that executor owes debt to estate conclusive — contempt of executor in refusing to pay — burden on executor to show insolvency.

*Matter of Strong*, 281.

§ 2546 — Transfer tax — surrogate has power to order reference to determine question of residence of decedent.

*Matter of Bishop*, 545.

§§ 2552, 2555, 2714 — Executors — decree that executor owes debt to estate conclusive — contempt of executor in refusing to pay — burden on executor to show insolvency.

*Matter of Strong*, 281.

§§ 2726, 2727 — Compulsory accounting on unreasonable neglect of executor.

*Clark v. Scovill*, 35.

**CODE OF CIVIL PROCEDURE — Continued.**

§ 3253 — Negligence — death of brakeman while coupling defective cars — extra allowance denied.

*Freemont v. Boston & Maine R. R. Co.*, 831.

§ 3320 — Trustees receiving specific stock in trust for life beneficiary are entitled to receive one-half commissions thereon.

*Robertson v. de Brulatour*, 882.

§ 3380 — Eminent domain — when immediate possession of condemned lands ordered under section 3380 of the Code of Civil Procedure on payment of money — said section constitutional — failure of owner of lands to state value thereof — what constitutes public purpose.

*Matter of Niagara, Lockport & Ontario Power Co.*, 636.

§ 3412 — Mechanic's lien — no lien for tearing down buildings under contract to erect other buildings — no recovery on *quantum meruit* may be had in an action on a mechanic's lien when the lien not established — when architect's certificate necessary.

*Thompson-Starrett Co. v. Brooklyn Heights Realty Co.*, 358.

[See table of sections of the Code of Civil Procedure cited, *ante*, in this volume.]

**CODE OF CRIMINAL PROCEDURE.**

§ 672 — Criminal law — when withdrawal of counts in an indictment does not invalidate conviction under remaining counts — *nolle prosequi* abolished.

*People v. Lewis*, 558.

§§ 721, 722 — Criminal law — habeas corpus — when certificate of conviction sufficient.

*People ex rel. Cook v. Pitts*, 321.

[See table of sections of the Code of Criminal Procedure cited, *ante*, in this volume.]

**COMMISSIONER OF HIGHWAYS.**

*See* HIGHWAYS.

**COMMISSIONS.**

Of executor and administrator.

*See* EXECUTOR AND ADMINISTRATOR.

On sale.

*See* SALE.

Of trustees.

*See* TRUST.

**COMMITTEE.**

Of incompetent person.

*See* INCOMPETENT PERSON.

**COMMON CARRIER.**

*See* CARRIER.

**COMPLAINT.**

*See* PLEADING.

**CONDEMNATION PROCEEDING.**

*See* EMINENT DOMAIN.

**CONDITIONAL SALE.**

*See* SALE.

**CONFESSION.**

When competent as evidence.

*See* EVIDENCE.

**CONFIDENTIAL COMMUNICATION.**

To physician.

*See* PHYSICIAN.

**CONFLICT OF LAWS.**

Trust — when foreign judgment that note has outlawed is binding here.  
*Blair v. Cargill*, 858.

**CONSPIRACY.**

*See* FRAUD.

**CONSTITUTIONAL LAW.**

1. *When local bill not unconstitutional in embracing subject not expressed in title.* Chapter 476 of the Laws of 1906, entitled "An act to authorize the city of Elmira to issue its bonds for the construction of a bridge or the reconstructing and repairing of an existing bridge across the Chemung river in the city of Elmira," is not in violation of section 16 of article 3 of the State Constitution in embracing more than one subject, although it authorizes the issue of bonds for said purposes. *City of Elmira v. Seymour*, 199.

2. *Title, when sufficient.* In order to be constitutional it is not necessary that the title of a bill shall be the best that could be selected, nor is it necessary to set forth in the title the various details of the object or purpose to be accomplished by the bill; it is sufficient if the title properly expresses the general purpose of the bill so as to apprise the public of the interests affected thereby. *Id.*

Municipal corporations — treasurer of Delaware county not authorized to pay over to towns taxes received from railroads — failure of said treasurer to show that town received the benefit of such payment — Laws of 1903, chapter 515, unconstitutional as applied to this case.

*Town of Walton v. Adair*, 817.

Municipal corporations — civil service rule of city of New York requiring six months' service before admission to examination for promotion is constitutional — mandamus to compel admission to such examination before such service refused.

*Matter of Ricketts*, 669.

Trial — suit in equity — new trial ordered when trial justice designated to Appellate Division before signing and filing decision — cause cannot await expiration of such designation — court cannot compel submission of case on former testimony.

*Williamson v. Randolph*, 539.

Eminent domain — charter of the Niagara County Irrigation and Water Supply Company did not require assent of two-thirds of Legislature — rights of State in waters and bed of Niagara river.

*Niagara County I. & W. S. Co. v. College Heights L. Co.*, 770.

Eminent domain — when immediate possession of condemned lands ordered under section 8380 of the Code of Civil Procedure on payment of money — said section constitutional.

*Matter of Niagara, Lockport & Ontario Power Co.*, 686.

**CONSTRUCTION.**

Of contracts.

*See* CONTRACT.

Of deeds.

*See* DEEDS.

Of wills.

*See* WILL.

**CONTEMPT.**

1. *Order to show cause must be served personally.* An order to show cause why one should not be punished for contempt must be served personally, and service upon counsel is not sufficient. *Matter of Weeks v. Coe*, 337.

2. *Relief not asked in motion papers cannot be granted.* On the return of an order to show cause why an attorney should not be punished for contempt and for such other and further order as may to the court seem just, etc., an order requiring such attorney to deposit money with a trust company is improper, as such relief was not indicated in the motion papers. *Id.*

**CONTEMPT** — *Continued.*

Executors — decree that executor owes debt to estate conclusive — contempt of executor in refusing to pay — burden on executor to show insolvency.

*Matter of Strong*, 281.

Proceedings — failure to pay alimony — waiver of right to the amount granted in judgment.

*Compton v. Compton*, 928.

**CONTRACT.**

1. *Contract of transferor of stock that corporate debts will be collected — such contract not for benefit of corporation.* When the owner of corporate stock upon transferring to a third person a sufficient number of shares to give a controlling interest, guarantees that the accounts receivable by the corporation will be collected and that certain claims will not be made against the corporation, and agrees to pay to the corporation or to the transferee of the stock the amount of any accounts not collected, etc., or deduct the value thereof from the price set upon the balance of the stock which the transferee has an option to purchase, such promise is personal to the transferee and for his benefit. It is not made for the benefit of the corporation, which, therefore, is not entitled to enforce the promise. *Rochester Dry Goods Co. v. Fahy*, 748.

2. *When no action by corporation lies thereon.* The only standing which such corporation can have in order to enforce such promise would be as assignee of the rights of the promisee, and when no such assignment is alleged and no amendment setting out such assignment is asked, a nonsuit is proper. *Id.*

3. *Proof of assignment of rights of purchaser not admissible unless alleged in complaint.* Evidence of said assignment is not admissible unless alleged in the complaint.

Doctrine of *Lawrence v. Fox* discussed and limited. *Id.*

4. *Assignment — parol assignment of written contract.* When the defendant has contracted with the plaintiff's assignor, from which it leased a saw mill "and all present facilities for manufacturing and handling lumber," to return at the termination of the contract as many feet of lumber used as "crossers" in lumber piles as it now holds or pay for any not so returned, the plaintiff under a parol assignment of said contract can recover from the defendant the sum agreed to be paid for "crossers" not returned. *St. Regis Paper Co. v. Page Lumber Co.*, 108.

5. *When assignee can recover thereon.* Such recovery cannot be defeated on the ground that title to the leased property did not pass under an assignment of the lease to the plaintiff, for the plaintiff is an assignee of the defendant's contract to pay for "crossers" not returned. *Id.*

6. *Erroneous charge.* When, however, the plaintiff as assignee of said contract and as grantee of the saw mill seeks to recover the value of certain "covers" used for protecting lumber piles, which "covers" were not mentioned in the contract of the defendant with the assignor, unless considered to be covered by the phrase "all present facilities for manufacturing and handling lumber" contained in the lease of the saw mill, it is error to charge that the plaintiff can recover such leased property of the defendant as assignee of a contract not mentioning said "covers," for the presumption is that the title to said "covers" remained in the assignor. *Id.*

7. *To pay commissions on fire insurance — no commissions recoverable on insurance furnished to replace canceled policies.* Under a contract which requires the defendant to carry certain fire insurance and to pay the plaintiff a commission on the insurance furnished by him, the plaintiff is not entitled to commissions on insurance furnished by him to take the place of other insurance which was canceled by the insurers, and on which the defendant had already paid commissions. This is so, although the amount of insurance to be carried had been modified by consent of parties. *Tanenbaum v. Federal Mutch Co. (No. 2)*, 416.

8. *Evidence — payment of commissions may be shown by judgment roll in former action.* The fact that the defendant has paid commissions on the insurance annually issued may be shown by the judgment roll in an action between the same parties, in which that fact was established. *Id.*

**CONTRACT — Continued.**

9. *Of employment on commission — when plaintiff entitled to commissions on sale of goods removed from his control.* A contract of employment for a fixed time which gives to the plaintiff certain commissions on the sales of "cloaks and suits now known as Departments Nos. 21 and 18" entitles such plaintiff to commissions on cloaks and suits which at the time of contract were sold in these departments, but which during the term of the contract were transferred by the defendant to other departments. *Hearn v. Stevens & Bro.*, 101.

10. *Contract construed in light of existing conditions.* Such contract must be interpreted in view of the conditions existing at the time of contract.

A plaintiff is not precluded from asserting his rights under such contract by not objecting to the transfer of portions of said goods to other departments. *Id.*

11. *Real property — covenant not to erect tenement house — such covenant not violated by erection of apartment house.* A contract between adjoining landowners, covenanting that neither of them will, for a period of twenty-five years, erect "any tenement house," is not violated by the erection of an apartment house of modern and superior construction.

There is a difference between an apartment house and a tenement house which will be recognized by the courts. *Marz v. Brogan*, 480.

12. *Burden of proof to show meaning of covenant.* To restrain the erection of such apartment house as a violation of said covenant, the burden is on the plaintiff to show that the building is what is known as a "tenement house" within the meaning of the covenant. *Id.*

*Corporation — liability of directors of credit insurance corporation for investing funds of said corporation in worthless stock of another corporation — when receiver of such corporation not estopped by action of stockholders authorizing such investment.* *Boyers v. Male*, 209.

*Lunatic — committee cannot authorize sale of timber on lands of lunatic without permission of court — committee entitled to recover value of timber so cut, although the defendant has paid therefor to the husband and son of the lunatic.* *Scribner v. Young*, 814.

*Mechanic's lien — no lien for tearing down buildings under contract to erect other buildings — no recovery on quantum meruit may be had in an action on a mechanic's lien when the lien not established — when architect's certificate necessary.*

*Thompson-Starrett Co. v. Brooklyn Heights Realty Co.*, 358.

*Partnership — when new partnership cannot recover on unperformed contract of sale made by former partnership — amendment of pleading — when error to refuse to allow vendee to amend answer to allege breach of contract.*

*Piper v. Seager*, 113.

*Executors and administrators — contract by decedent to pay annuity to friend — when consideration sufficient — infancy — when such contract made by infant ratified at majority — when such contract governed by law of this State.*

*Parsons v. Teller*, 687.

*Common carrier — no recovery on common-law liability of carrier under complaint setting out breach of express contract — recovery for tort not proper under complaint on contract — failure to show conversion.*

*Rosenfeld v. Central Vermont R. Co.*, 371.

*Complaint — action against syndicate on guaranty to sell securities — when damage sufficiently alleged — complaint on breach of contract not demurrable for failure to allege damage — contract construed.*

*Gauze v. Commonwealth Trust Co.*, 530.

*Carrier of goods — bill of lading constitutes contract — erroneous charge — evidence — statements of carrier's servant made after delivery of goods inadmissible.*

*Hoffman v. Metropolitan Express Co.*, 407.

*Suretyship — bond to secure proper performance of contract — when surety is bound by parol waivers of provisions of contract — estoppel of surety.*

*Hellman v. City Trust, Safe Deposit & Surety Co.*, 879.

*Attorney and client — contract for contingent fee sustained — evidence — diary of deceased attorney admissible to show services rendered.*

*Burke v. Baker*, 422.



**CONTRACT — Continued.**

Evidence — when oral contract for sale of lands not merged in written receipt for deposit — when parol evidence of oral contract admissible.

*Winter v. Friedman*, 806.

Taxation of costs — costs before notice of trial in action for money had and received — when complaint states such cause of action.

*Lange v. Schile*, 618.

Husband and wife — husband's contract for support after separation is enforceable — jurisdiction of Municipal Court of New York.

*Reardon v. Woerner*, 259.

Sale — when contract for sale of goods not entire — finding that there was no "delivery" construed.

*Williams v. Wilson & McNeal Co.*, 442.

Mortgage — assignor of mortgage who guarantees payment proper party on foreclosure.

*Robert v. Kidansky*, 475.

Of sale of personal property.

See SALE.

Specific performance of.

See SPECIFIC PERFORMANCE.

Of sale of real property.

See VENDOR AND PURCHASER.

**CONVERSION.**

1. *Of stock — when transferee of messenger sent for stock liable for conversion — when messenger not clothed with indicia of title — evidence — conversations of messenger with deceased owner of stock excluded — when testimony on rebuttal founded on matter brought out on direct examination.* The plaintiff's testatrix had pledged stock with brokers to secure a loan, and to enable them to collect the dividends had transferred the stock to the name of said brokers. The testatrix telephoned the brokers that she would redeem the stock, and sent a messenger with a check for the amount of the loan. The brokers delivered the stock to the messenger with power of attorney executed thereon, so that the stock could be transferred by the bearer. The messenger converted said stock to his own use by delivering the same to other brokers to be credited to his account, and afterwards directed it to be sold, which was done and the proceeds paid to said messenger. In an action for conversion against the brokers to whom the messenger had delivered the stock,

*Id.* that as the owner had conferred no indicia of title on the messenger or apparent authority to transfer title, there was no estoppel, and her executrix could recover the value of said stock from the brokers;

That, although the brokers with whom the stock was originally pledged had authority to deliver to the messenger, they had no authority to deliver it in such form that the messenger was invested with an apparent power of disposal;

That the conversations of such messenger with the testatrix were inadmissible under section 829 of the Code of Civil Procedure, as such messenger was an interested party within the meaning of said section, for the defendant brokers were seeking to show that the title of such messenger was good, and further, because he was personally interested, being liable to the defendants if they were liable to the plaintiff;

That, as the messenger testifying for the defendants on direct examination had stated that he had notified the plaintiff's husband that he had kept the stock in his possession, and had stated on cross-examination that he had shown the plaintiff's husband the paper on which defendants' title was based, it was not error to allow the plaintiff's husband to contradict the latter's statement on rebuttal, as the foundation for the cross-examination was testimony brought out on direct examination. *Hall v. Wagner*, 70.

2. *Agreement by landlord that tenant may store property on premises after expiration of lease — landlord not liable for conversion by reason of removal of such property by new tenant.* When a lessee, whose lease has expired, has been allowed by his lessor to store personal property in a loft of the building until the building is leased, he cannot recover as for a conversion against his former landlord because said property has been moved out without notice by a new tenant who

**CONVERSION — Continued.**

leased the entire building, since the owner in leasing the building to the new tenant was merely exercising a legal right.

*Quare*, as to whether an action for damages would lie against the owner of the building. *Huntington v. Herrman*, 875.

3. *When complaint states cause of action for conversion.* A complaint which alleges in substance that the defendant, acting as plaintiff's attorney, induced him to turn over moneys on a promise to invest the same in a water company in which the defendant was interested, which representations were false, etc., and that the defendant did not so invest said moneys but converted the same to his own use, can be regarded as stating a cause of action for conversion and not for false and fraudulent representations. *Sinclair v. Higgins*, 206.

4. *When question as to whether moneys were turned over for investment or as loan is for the jury.* If there is some evidence of such promise to invest the moneys, it is error to dismiss the complaint on the ground that the moneys were loaned to the defendant. It is a question for the jury as to whether the moneys were turned over for investment or as a loan. *Id.*

5. *When written evidence not conclusive.* Papers introduced in evidence and in form evidencing a loan are not conclusive. *Id.*

6. *Measure of damage—when plaintiff not entitled to recover highest market value.* In an action for the conversion of personal property, in the absence of special circumstances, the value of the property at the time of such conversion, with interest, is the measure of damage, and it is error for the court to charge that the plaintiff is entitled to recover "the highest value of the article converted \* \* \* from the time of the conversion to the time of trial," with interest on such value. *Corn Exchange Bank v. Peabody*, 553.

7. *Erroneous charge.* When the jury has found a verdict for the highest value proved by the plaintiff, in the face of evidence of a much less value shown by the defendant, it cannot be said that such erroneous charge did not prejudice the defendant, as it excluded the defendant's evidence from the consideration of the jury. *Id.*

Sale—secured debt sold as worthless by assignee for benefit of creditors—mutual mistake of fact—error in excluding evidence that purchaser did not know debt was secured—when sale should be rescinded because minds of parties have not met—counterclaim asking rescission requires reply.

*Flynn v. Smith*, 870.

Corporation—liability of directors of credit insurance corporation for investing funds of said corporation in worthless stock of another corporation—when receiver of such corporation not estopped by action of stockholders authorizing such investment.

*Bowers v. Male*, 209.

Chattel mortgage—on default mortgagee must take possession or refile mortgage—when proof of taking possession sufficient—conversion by sheriff selling under execution—when surety who indemnifies sheriff liable to mortgagee.

*Sloan v. National Surety Co.*, 94.

Former judgment for tort unsatisfied does not bar subsequent action against joint tortfeasor—subsequent action barred only when prior judgment satisfied—reply not necessary to defense of former recovery.

*Reno v. Thompson*, 316.

Common carrier—no recovery on common-law liability of carrier under complaint setting out breach of express contract—recovery for tort not proper under complaint on contract—failure to show conversion.

*Rosenfeld v. Central Vermont R. Co.*, 871.

Conditional sale—retaking of property inconsistent with affirmance of sale.

*Cooper v. Payne*, 785.

Of real into personal property.

*See REAL PROPERTY.*

**CORRESPONDENT.**

In divorce action.

*See HUSBAND AND WIFE.*

**CORPORATION.**

1. *Liability of directors of credit insurance corporation for investing funds of said corporation in worthless stock of another corporation — when receiver of such corporation not stopped by action of stockholders authorizing such investment.* Action by the receiver of an insolvent credit insurance company against its directors personally to recover sums alleged to have been wasted by the defendants in the purchase of the worthless stock of another corporation under the control of said corporation.

The facts, in brief, were as follows:

The credit insurance corporation doing a losing business became unable to report the surplus required by the statutes of other States to entitle it to do business in such States. In order to satisfy the requirements as to said surplus, a plan was devised to reduce the capital stock which in said States was treated as a liability and to create a surplus to be made up by the conversion of a portion of its capital into surplus through the retirement and cancellation of an equal amount of stock, and by the raising of a further sum in cash. This plan was sanctioned by the stockholders at a regular meeting, at which the formation of a corporation was authorized, to be called the "Reserve Company," with a capital through which the surplus of the credit insurance company should be increased. The purchase of stock of said Reserve Company was authorized, but it was provided by the stockholders that stock so purchased should not appear as an asset. The said Reserve Company was formed, but it was found impossible to dispose of any of its stock in open market, and the only asset of said company was an agreement made between the credit insurance company and one Smith, by which the latter was to pay the former \$50,000 for full-paid stock to be canceled on delivery and \$50,000 balance in installments, in consideration of which payments the insurance company agreed to pay Smith or his assigns \$1 for each \$1,000 of insurance in force on its books at certain periods. The said agreement further provided that said Smith, or his assigns, was only entitled to such payment in proportion to the sums advanced by him, and that a failure on his part to advance the sums should only operate to forfeit his right to said payment. This contract was assigned by Smith to the Reserve Company. Smith became the owner of the entire stock of the Reserve Company on the assignment of the contract, and the Reserve Company agreed to hold Smith harmless from all liability to the insurance company, and thereafter said insurance company did release said Smith from liability on said contract. Smith thereupon reassigned the capital stock of the Reserve Company to said company in consideration of its agreement to hold him harmless.

As said transactions did not enable the insurance company to report a sufficient surplus to do business in other States, the defendant directors subscribed for and bought \$30,000 worth of stock of the Reserve Company, borrowing the money to pay therefor. Thereafter the defendant directors authorized the purchase by the insurance company of the stock of the Reserve Company, which was carried out by the purchase of the stock held by the defendants. Other transactions of the same nature were carried out by the defendants as particularly set forth in the opinion.

*Held*, that the defendants were personally liable to the receiver of said insurance company for sums squandered in the purchase of said stock of said Reserve Company known by them to be worthless;

That said directors were not relieved from said personal liability by reason of the resolution of the stockholders of said insurance company authorizing the formation of said Reserve Company and the purchase of the stock thereof;

That said defendants were not relieved from personal liability by reason of a resolution of the stockholders of said insurance company ratifying the acts of said directors in purchasing said stock when said directors had control of said meeting by controlling the majority of the stock in person or by proxy. *Bowers v. Male*, 209.

2. *Action to determine ownership of stock — findings unwarranted by evidence — written declarations in claimant's own behalf inadmissible — stock certificate book not made evidence by statute.* Action by a corporation to determine the ownership of certain shares of its corporate stock and to call in certain alleged certificates, to declare certain certificates void, and to determine the rights of claimants to stock.

**CORPORATION — Continued.**

A judgment in favor of certain stockholders is reversed and a new trial granted because of the following erroneous findings and rulings by the referee:

*First*, when the by-laws provide that no director shall receive compensation for performing any special services except by a two-thirds vote, and that no debt beyond the current expenses of the company shall be contracted by the directors without the assent of a majority of the stockholders, a finding that certain stock issued to a director by mutual consent of the directors, but without formal resolution and without being countersigned by the legally elected treasurer, as required by the by-laws, was the property of said director is error. Evidence for and against the authority to issue said stock, considered.

*Second*, when certain stock was assigned by the holder in consideration of a note by the assignee expressly providing for a reassignment if the note should not be paid, and the assignee never paid the note, and the assignor thereupon assigned all his interest in the note and the stock to another person, it is error to find a title in the first assignee and to refuse to determine the title of the second assignee. All parties being before the court, their respective rights should have been determined.

*Third*, when conflicting evidence as to the title of certain shares of stock has been received, and there is no specific finding as to whom said shares belong, a new trial is necessary.

*Fourth*, it is error to admit statements indorsed on original canceled certificates made by the claimant himself which show his title to the stock issued therefor. Such declarations in the claimant's own behalf are inadmissible, and a stock certificate book is not, like a stock transfer book, made competent evidence by Laws of 1875, chapter 611, section 17. *Geneva Mineral Springs Co., Limited, v. Steele*, 706.

8. *Action by stockholder to dissolve corporation and set aside prior voluntary dissolution — complaint — failure to state cause of action — when directors not necessary parties defendant.* The complaint in an action by a stockholder under section 1785 of the Code of Civil Procedure to procure the dissolution of a corporation alleged that the ordinary and lawful business of the corporation had been suspended for at least a year and the submission of a written statement of facts to the Attorney General and his failure to institute an action within sixty days, and further alleged in substance that in a prior proceeding by the corporation in voluntary dissolution, pursuant to section 57 of the Stock Corporation Law, a certificate had been issued by the Secretary of State to the effect that the corporation had complied with said section in order to be dissolved in pursuance thereof, but that said proceeding was taken without notice to the plaintiff or to minority stockholders and for the purpose of defrauding the plaintiff and minority stockholders, etc., in pursuance of a conspiracy set forth in the complaint. The relief demanded was that the voluntary dissolution be set aside.

*Held*, that as said complaint did not allege that the notice to stockholders required by the statute (Stock Corporation Law, § 57) had not been published or that no notice had been served upon or mailed to the stockholders, the complaint failed to state a cause of action;

That the allegations as to the fraudulent purpose of the voluntary dissolution were not allegations of fact which justified a judgment declaring the proceedings void, but were mere allegations of motive which were immaterial.

*It seems*, that the directors are not necessary parties defendant in such action when no personal judgment is asked against them. *Knickerbocker v. Grotton Bridge & Manufacturing Co.*, 145.

4. *Stockholder's action to recover corporate assets dissipated by fraud — when prior demand that corporation bring action not necessary.* In an action by a stockholder, who claims to have been induced by fraud to place his stock in the hands of a trustee, and with other stockholders to have been defrauded, pursuant to a conspiracy of the officers of the corporation and others to put the corporation through bankruptcy to defraud its creditors and stockholders other than those participating in the conspiracy, to recover the assets dissipated by the collusion of said officers, it is not necessary to allege a refusal of the corporation upon demand to commence such action if the only officers upon whom such demand could have been made are shown to have participated in the conspiracy.

Under other circumstances such demand and refusal would be necessary to make out a cause of action. *Weber v. Wallerstein (No. 1)*, 693.

**CORPORATION — Continued.**

5. *Proper parties defendant.* Individuals not members of the corporation, who are alleged to have participated in the conspiracy, are properly made parties defendant in order that they may be compelled to account.

Though a plaintiff in such action has no standing save as a stockholder, the fact that his stock is held by said trustee does not prevent his action when the trustee is shown to have been appointed by fraud in which he participated. *Id.*

6. *Time of trial.* It is not necessary to postpone the action until the termination of an action to recover the stock from said trustee. *Id.*

7. *Valuation of stock in private business corporation — when price received therefor is adequate.* When the stock is that of a private family corporation owning no patents or monopoly and engaged in a manufacturing business, the success of which depends upon competition, which stock has no listed market value, its fair market value may be shown by the testimony of one who has been connected with the business and has personal knowledge of its affairs. Its worth is not to be measured by that set out in an inventory of the corporation, but at the probable market value on liquidation.

The valuation of such stock by the Special Term confirmed. *Cable v. Cable*, 426.

8. *Evidence — when expert opinion as to value excluded.* As such stock has no recognized market value, it is not error to exclude the opinions of expert witnesses having no knowledge of the corporate affairs based upon hypothetical questions only. *Id.*

9. *Corporate bonds — when president of corporation has sufficiently accounted for bonds received for sale.* When a corporation by resolution authorizes an issue of bonds to be sold for the benefit of the corporation, and does not specify which officers are to sell them, the president of such corporation who has received the bonds for sale and has turned over some of them to the vice-president to sell is not accountable to the corporation for the bonds so turned over, in the absence of proof of negligence or collusion against the interests of the corporation in so doing. *Owego Gas Light Co. v. Boyer*, 140.

10. *Delivery of bonds to other officer for sale.* Such president has sufficiently accounted for said bonds by showing that he turned them over to the vice-president for sale. *Id.*

Testamentary trust — life beneficiary of the income and dividends of specific stock placed in trust is entitled to receive dividends declared thereon — distinction in this respect between trust of specific stock and trust of a fund of money — subscription rights accruing on such stock go to increase corpus of the trust — unnecessary to provide a sinking fund to provide against depreciation in value of specific securities — trustees receiving such specific stock entitled to one-half commissions — when life beneficiary entitled to act as trustee — when life beneficiary acting as trustee entitled to commissions.

*Robertson v. de Brulattour*, 882.

Contract — contract of transfer of stock that corporate debts will be collected — such contract not for benefit of corporation — when no action by corporation lies thereon — proof of assignment of rights of purchaser not admissible unless alleged in complaint.

*Rochester Dry Goods Co. v. Fahy*, 748.

Negligence — membership corporation liable for personal injuries received through negligence of its servants — evidence — statement of member of such corporation to accident insurance company that he was being carried home not conclusive.

*Beecroft v. New York Athletic Club*, 392.

Life insurance corporation — when sale of assets to other corporation valid — when Superintendent of Insurance not personally liable for allowing substitution of bonds deposited in his department.

*Raymond v. Security Trust & Life Insurance Co.*, 191.

Real property — injury to shade trees by erection of telephone poles — damage recoverable when injury is wanton — when complaint dismissed for failure to show damage.

*Osborne v. Auburn Telephone Co.*, 702.

**CORPORATION — Continued.**

Trust — beneficiary entitled to "dividends, issues and profits" of stock in manufacturing corporation — what portion of increase in assets of corporation included under said terms.

*Matter of Stevens*, 773.

Deposition — examination of officer of corporation — Code of Civil Procedure, §§ 870, 872, 873, and rule 82 construed — matters not a defense to such application — laches no bar.

*Goldmark v. U. S. Electro-Galvanizing Co.*, 526.

Preferred cause — when action by receiver of corporation entitled to preference.

*Schlesinger v. Gilhooly*, 158.

Life insurance — mutual company without stock is not a stock corporation.

*People ex rel. Venner v. New York Life Insurance Co.*, 183.

Inheritance tax — valuation of unlisted stock in private corporation.

*Matter of Curtice*, 230.

Receivers — when not appointed in action to recover corporate assets.

*Weber v. Wallerstein*, (No. 2), 700.

Societies, clubs and similar bodies.

See ASSOCIATION.

To carry on insurance business.

See INSURANCE.

See RAILROAD.

**COSTS.**

1. *Taxation of costs* — costs before notice of trial in action for money had and received. In an action in tort the costs before notice of trial should be taxed at twenty-five dollars, but if the action be *ex contractu* said costs should be taxed at fifteen dollars. *Lange v. Schile*, 613.

2. *When complaint states such cause of action.* When the allegations of a complaint make it doubtful whether an action is in tort for money received in a fiduciary capacity and converted, or merely for money had and received, it should be construed as an action *ex contractu* and the costs before notice of trial taxed at fifteen dollars. *Id.*

3. *Allegation of conversion.* The mere allegation that the defendant, who had received moneys from the plaintiff to pay out on certain claims, "converted the same to his own use," does not characterize the cause of action but may be regarded as surplusage.

Ambiguous complaint construed. *Id.*

Attorney and client — attorney's lien on settlement by client — no lien for costs.

*Oishei v. Metropolitan Street R. Co.*, 912, 913.

Negligence — death of brakeman while coupling defective cars — extra allowance denied.

*Freemont v. Boston & Maine R. R. Co.*, 831.

Stay of proceedings for failure to pay costs of former action.

*Loftus v. Straight Line Engine Co.*, 718.

Negligence — extra allowance improper.

*Walker v. Newton Falls Paper Co.*, 19.

**COUNTERCLAIM.**

See SETOFF.

**COUNTY.**

1. *Municipal corporations* — treasurer of Delaware county not authorized to pay over to towns taxes received from railroads. The payment by the treasurer of the county of Delaware to the supervisor of the town of Walton of the taxes received from the New York, Ontario and Western Railroad Company on its assessment in said town, exclusive of taxes for school district and highway purposes, was illegal, as by section 13 of the General Municipal Law such moneys were required to be applied to the redemption of the outstanding bonds of said town issued to aid in the construction of said railroad.

**COUNTY — Continued.**

The town is entitled to recover said moneys from the county treasurer. *Town of Walton v. Adair*, 817.

2. *Failure of said treasurer to show that town received the benefit of such payment.* In an action to recover such moneys the burden is on the defendant to show that the town has had the benefit of the moneys when he seeks to justify the payment to the supervisor on such grounds. Such burden of proof is not sustained when it appears that the moneys paid to the supervisor by the county treasurer were mingled by him with other moneys in his hands and that the moneys expended by said supervisor for the town were less in amount than the other funds he had at his disposal for such purpose, exclusive of said railroad taxes. *Id.*

8. *Laws of 1903, chapter 515, unconstitutional as applied to this case.* Laws of 1903, chapter 515, amending section 13 of the General Municipal Law, validating payments theretofore made in good faith by the treasurer of any county to any town of taxes received from railroad corporations, is unconstitutional and in violation of section 10 of article 8 of the State Constitution when it has the effect of extinguishing existing causes of action.

Decisions apparently to the contrary were made prior to the adoption of said clause of the Constitution. *Id.*

False imprisonment — evidence — error in excluding rules of institution which permitted imprisonment of plaintiff — evidence that defendants reported their act to the head of institution — error in excluding instructions given to defendants — delegation of power to confine inmates of institution.

*Cunningham v. Shea*, 624.

Board of supervisors — power to offer reward for information of horse thieves — liability therefor.

*People ex rel. Collins v. Brower*, 915.

See MUNICIPAL CORPORATION.

**COURT.**

1. *Municipal Court of New York — order opening default not reviewable on appeal from judgment which has been vacated.* As section 357 of the Municipal Court Act of the city of New York prohibits an appeal from an order opening a default and vacating a judgment entered thereon, a plaintiff who has obtained a judgment by default, which has been opened and the judgment vacated, cannot review said order under the guise of an appeal from the judgment in his favor. *Wendin v. Brooklyn Heights R. R. Co.*, 390.

2. *Services of attorney to executor.* The Appellate Division will confirm the findings of such referee and surrogate as to the value of such services when the findings are not against the weight of the evidence. *Matter of Smith*, 23.

Trial — suit in equity — new trial ordered when trial justice designated to Appellate Division before signing and filing decision — cause cannot await expiration of such designation — court cannot compel submission of case on former testimony.

*Williamson v. Randolph*, 539.

Life insurance — mutual company without stock is not a stock corporation — mandamus to compel allowance of inspection of list of members not a statutory right — common-law writ in discretion of court — when such writ will be refused.

*People ex rel. Verner v. New York Life Insurance Co.*, 183.

Crime — payment for goods with worthless check — evidence insufficient to sustain conviction for violation of section 529 of the Penal Code — erroneous refusal to charge — jurisdiction, question cannot be raised on conflicting evidence.

*People v. Lipp*, 504.

Practice — action on life insurance policy — error to dismiss complaint because answer sets out short Statute of Limitations — prior action in County Court discontinued because of lack of jurisdiction.

*Bannister v. Michigan Mutual Life Insurance Co.*, 765.

Evidence — when written statement of defendant's witness inadmissible — counsel not entitled to read such statement to witness — power of trial judge — negligence — injury while alighting from train.

*Finan v. New York Central & Hudson River R. R. Co.*, 383.

**COURT** — *Continued.*

Husband and wife — husband's contract for support after separation is enforceable — jurisdiction of Municipal Court of New York. *Reardon v. Woerner*, 259.

*See PRACTICE.*

Of surrogate.

*See SURREGATE.*

**COVENANT.**

In lease.

*See LANDLORD AND TENANT.*

**CREDITOR'S BILL.**

*See DEBTOR AND CREDITOR.*

**CRIME.**

1. *Criminal law — when withdrawal of counts in an indictment does not invalidate conviction under remaining counts — nolle prosequi abolished.* Although on the trial of an indictment charging (1) burglary in the third degree, (2) grand larceny in the first degree, (3) receiving stolen goods, the prosecution abandoned the first and second counts, a motion to arrest judgment after a conviction on the third count should not be granted when the point that the third count became defective by the withdrawal of the first and second counts was not raised until after the conviction.

In the absence of such objection, the withdrawn counts remain in the indictment for the purpose of explaining the references contained in the third count, and if when retained for that purpose the third count is sufficient, arrest of judgment should not be granted.

The *nolle prosequi* is abolished by section 672 of the Code of Criminal Procedure. *People v. Lewis*, 558.

2. *Payment for goods with worthless check — evidence insufficient to sustain conviction for violation of section 529 of the Penal Code — erroneous refusal to charge.* When on the trial of an indictment for a violation of section 529 of the Penal Code in giving a worthless cheque in payment for goods, it is shown that after the dishonor of the cheque the vendor's agent went to Maine with the defendant and negotiated a transfer of real estate in that State to secure the sum due, thus treating the transaction as a simple indebtedness, and when such agent is not produced by the complainant on the trial to rebut the claim of the defendant that presentation of said cheque was to be delayed, and when the trial judge refuses to charge that the jury may consider the conduct of the parties toward each other on the question of criminal intent, a new trial should be granted in furtherance of justice. *People v. Lipp*, 504.

3. *Jurisdiction, question cannot be raised on conflicting evidence.* When there is an issue as to whether the goods were delivered to the defendant in New York or in Boston, Mass., by express, the defendant cannot raise the question of jurisdiction of the State court on such conflicting evidence. *Id.*

4. *Uttering forged note — knowledge of defendant.* When upon the trial of an indictment containing two counts, *first*, for forging a note, and, *second*, for uttering said forged note, the first count is withdrawn, the knowledge of the defendant that the note was forged becomes an issue, and it is reversible error to exclude evidence of communications made to the defendant by any person respecting the validity of the note, and whether or not it was made by the drawer or by his authority, or that it was genuine and not forged. Such communications bear directly upon the question as to whether the defendant knew that the note was forged when he uttered it. *People v. Dolan*, 600.

5. *Evidence — error in excluding communications made to defendant as to general character of notes.* The evidence of such communications to defendant should not be restricted to those made to him before or at the time that he uttered the note when he claims to have first learned of the forgery when it was protested for non-payment, and it is error to exclude such communications made after that time. *Id.*

6. *When error to admit evidence of other unrelated forgeries.* While evidence of other forgeries so related to the transaction in question as to show a common motive or intent may be admissible on the question of motive or knowledge that said note was forged, it is reversible error to admit evidence of other independent



**CRIME — Continued.**

forgeries which are not so related to the forgery in question as to throw light upon the defendant's knowledge thereof. *Id.*

7. *Larceny — admission of evidence of another and unconnected theft by defendant reversible error.* On the trial of an indictment for grand larceny in stealing a diamond pin, it is reversible error to admit, against objection, evidence of a former and unrelated larceny by the defendant. It is not permissible to introduce evidence of an independent crime to establish the guilt of a person indicted for a specific offense.

Such evidence only becomes admissible when the two crimes were committed in pursuance of a single scheme or design. *People v. Sekeson*, 490.

8. *Failure to correct such error.* When several witnesses have been allowed to testify as to such independent crime, the error is not cured by striking out some of the testimony if other parts remain on the record not stricken out and the judge in his charge makes no reference to such evidence and fails to instruct the jury to disregard it. *Id.*

9. *Confession of defendant to said unrelated theft not admissible against him.* The admission of evidence of such unrelated crime is none the less error because given as a confession made by the defendant to one of the witnesses. *Id.*

10. *Playing "craps" in vacant lot without breach of the peace is not criminal.* The throwing of dice for certain numbers, called "craps," is not in itself a crime, and when done by a boy and his companions in a vacant lot without noise or disturbance constituting a breach of the peace, is not a violation of section 675 of the Penal Code. *People v. McDermott*, 380.

11. *Criminal law — habeas corpus — when certificate of conviction sufficient.* A certificate of conviction which uses the words "having thereupon pleaded guilty, it is adjudged," etc., is a substantial compliance with the statute (Code Crim. Proc. §§ 721, 722), and furnishes no ground for the release of the offender on habeas corpus. *People ex rel. Cook v. Pitts*, 321.

12. *Criminal law — habeas corpus — certificate of conviction, when sufficient.* A certificate of conviction is not defective in failing to state the time when and the place where and the person from whom a larceny was committed, and such omissions furnish no ground for the release of the offender on habeas corpus. *People ex rel. Bidwell v. Pitts*, 319.

**DAMAGES.**

1. *Interest not recoverable on breach of covenant by tenant to repair.* A tenant who has covenanted to make all repairs and has failed to do so is not chargeable with interest on the sum recovered by the landlord in an action for damages for the breach of the covenant. Such damages are not ascertainable by computation, even though the landlord made the repairs at his own cost on the tenant's default. *Markham v. Stevenson Brewing Co.*, 178.

2. *Practice — when objection sufficient.* An objection to the allowance of such interest is timely if made when the court directs it to be added to the verdict. It need not be made before the jury goes out. *Id.*

*Mortgage — realty and chattel mortgage securing same debt — agreement that resort shall first be had to the realty mortgage — mortgagors not damaged by violation of said agreement by sale under chattel mortgage which conveyed no interest — counterclaim for such damage properly dismissed in action to foreclose realty mortgage.*

*McEchron v. Martine*, 805.

*Mechanic's lien — no lien for tearing down buildings under contract to erect other buildings — no recovery on quantum meruit may be had in an action on a mechanic's lien when the lien not established — when architect's certificate necessary.*

*Thompson-Starrett Co. v. Brooklyn Heights Realty Co.*, 358.

*Fire insurance — when mortgagor who bids in property on foreclosure entitled to indemnity for loss accruing prior to delivery of deed — measure of damages when mortgagee assigns part interest in bid before loss by fire.*

*Unfelder v. Palatine Insurance Co., Limited*, 57.

**DAMAGES — Continued.**

Libel — false publication calling plaintiff "a rogues' gallery man" — legal and express malice distinguished — proof of express malice essential to recovery of exemplary damages — erroneous charge.

*Carpenter v. New York Evening Journal Publishing Co.*, 266.

Complaint — action against syndicate on guaranty to sell securities — when damage sufficiently alleged — complaint on breach of contract not demurrable for failure to allege damage — contract construed.

*Gause v. Commonwealth Trust Co.*, 530.

Injunction to restrain sale of collateral security — when remedy at law adequate — complaint — failure to show irreparable damage and that remedy at law is inadequate.

*Ehrich v. Grant*, 196.

Real property — injury to shade trees by erection of telephone poles — damage recoverable when injury is wanton — when complaint dismissed for failure to show damage.

*Osborne v. Auburn Telephone Co.*, 702.

Conversion — measure of damage — when plaintiff not entitled to recover highest market value — erroneous charge.

*Corn Exchange Bank v. Peabody*, 558.

Real property — action for damages for injury to value thereof by elevated railway — measure of damages.

*Schmitz v. Brooklyn Union Elevated R. R. Co.*, 308.

Nuisance — damages to lessee of adjoining property by operation of electric light plant.

*Bly v. Edison Electric Illuminating Co.*, 170.

Mechanic's lien — damages — when interest not recoverable in action to foreclose lien.

*Fox v. Davidson*, 174.

Real property — injury to real estate by elevated railroad viaduct not *damnum absque injuria*.

*Wallach v. New York & Harlem R. R. Co.*, 273.

See LANDLORD AND TENANT.

**DE FACTO.**

Officer.

See OFFICER.

**DE JURE.**

Officer.

See OFFICER.

**DEBTOR AND CREDITOR.**

Creditor's bill to set aside conveyance — evidence — when deposition of grantor on supplementary proceedings casts burden on grantee to disprove fraud — failure to object to such deposition as hearsay — evidence of value of lands — in creditor's action court may set aside deed or declare it to be a mortgage.

*Lawrence Brothers, Inc., v. Heylman*, 848.

Reference to take accounts of assignee for benefit of creditors — report filed after death of assignee should be returned to referee — election of administratrix and sureties of assignee to end reference.

*Matter of Venable*, 508.

Creditor's bill — failure to show conveyance to be fraudulent — evidence — when deposition of grantor inadmissible against grantee.

*Wadleigh v. Wadleigh*, 367.

Assignment by debtor.

See ASSIGNMENT.

**DECEDENT'S ESTATE.**

Consent that claim against, be determined by surrogate — when action on claim barred by such consent.

*Clark v. Scovill*, 85.

**DECREE.***See* JUDGMENT.**DEED.**

*Action to set aside conveyance and assignment made by devisees—fraudulent representations by grantee—evidence sufficient to establish legitimacy and title of grantor.* Action to set aside a conveyance of plaintiff's interest as devisee under the will of Harriet Cramsey of certain real estate and an assignment of his interest in her estate on the grounds that the same were procured by false and fraudulent representations. Her will gave to her son Benjamin the use for life of a portion of her estate, and at his death "to his children then living."

The plaintiff claims title as the son and only heir of Benjamin. The action was defended on the ground that plaintiff was not the lawful issue of Benjamin, and that the instruments were not procured by fraud.

As to plaintiff's legitimacy it was shown that Benjamin Cramsey had lived with plaintiff's mother at the home of her parents at the time and before the birth of plaintiff; that plaintiff was born there; that Benjamin introduced plaintiff's mother to his relatives and neighbors as his wife, and brought a brother to see their son, the plaintiff; that plaintiff's mother preserved a paper which, though not in the statutory form, she regarded as a marriage certificate, and also a certificate of the baptism of plaintiff under the name of Cramsey. The agent employed to procure the deed and assignment knew of the plaintiff's existence as the son of Benjamin, and the deed and assignment recited the fact that he was such son; the grantee and assignee, a grandson of Harriet Cramsey, had full opportunity of ascertaining and knowing his relatives, and his father represented him in the investigation as to the existence of an heir of Benjamin and suggested that the deed and assignment run to defendant. The only evidence to the contrary was that of the defendant's father, that he did not know of any acquaintance or intimacy between his brother and plaintiff's mother, of their marriage or the birth of plaintiff, and that his brother did not live at the residence of plaintiff's mother.

*Held*, that assuming that the burden was on plaintiff to establish that he was the heir of Benjamin, he had sustained it by a fair preponderance of evidence and a finding that the contract of marriage was not proved was against the weight of evidence.

On the question as to whether the deed and assignment were procured by false and fraudulent representations, it was shown that the plaintiff was ignorant, could hardly read and write; that he did not solicit the purchase of his interest in the estate; that he was ignorant of his interest and was asserting no claim; that he was without business experience and relied entirely on his agent Dean, who was set in motion by the agent of defendant; that the deed and assignment were prepared at the instance of the defendant, and plaintiff was induced to refrain from talking with his uncle, with whom he lived; that the consideration paid was \$500, while the interest of defendant in the property was from four to ten times that amount; that he was led to believe that the interest assigned was in his father's estate and not his grandmother's; that it was of little value, heavily incumbered and likely to be lost by foreclosure. The defendant understood the value of plaintiff's interest. The plaintiff in his complaint and at the trial offered to return the amount paid with interest.

*Held*, that the plaintiff was deceived by misrepresentation of material facts and was entitled to rescind and have the deed and assignment canceled on returning the amount paid. *Cramsey v. Sterling*, 568.

Trust deed with remainders to heirs of beneficiary—when heirs to be ascertained at death of beneficiary—adoption—when adopted child is heir and takes trust estate to exclusion of brothers of beneficiaries.

*Gilliam v. Guaranty Trust Co.*, 656.

Trespass by cutting timber—reservation of right to cut timber construed—when no time set timber must be removed within reasonable time—when such right not acquired by prescription.

*Decker v. Hunt*, 821.

Will—power coupled with interest—conveyance by warranty deed for full value shows intention to exercise power.

*Vines v. Clarke*, 12.

In creditor's action court may set aside deed or declare it to be a mortgage.

*Lawrence Brothers, Inc., v. Heylman*, 848.

**DEFINITION.**

1. "*Principal.*" That a large increase in the value of the assets at the time of sale, made up of materials and "betterments," was to be treated as principal, being an increase in the value of the property itself, and should not be treated as a "profit" arising from or growing out of the stock held in trust. *Matter of Stevens*, 773.

2. "*Dividends, issues and profits.*" That the words "dividends, issues and profits," used in the creation of the trust, must be construed as meaning "income or earnings," and that a large balance representing good will could not be taken as earnings or increase. *Id.*

3. *What constitutes "capital."* That the value of the material on hand and the "betterments" at the time of sale should be considered as part of the capital or principal rather than "income or earnings," so far as the trusts were concerned. *Id.*

4. *Use of furnace included in the word "appurtenances."* Although a lease is silent as to the provisions for heat, it is immaterial because the right to heat with the only means provided therefor is included in the word "appurtenances." *Stevens v. Taylor*, 561.

**DELAWARE COUNTY.**

*See* MUNICIPAL CORPORATION.

**DELIVERY.**

Of goods sold.

*See* SALE.

**DEMURRER.**

*See* PLEADING.

**DEPOSIT.**

In a bank.

*See* BANKING.

**DEPOSITION.**

1. *Examination of officer of corporation* — *Code of Civil Procedure*, §§ 870, 872, 873, and rule 82 construed. Section 870 of the Code of Civil Procedure, as amended by Laws of 1904, chapter 696, allows a party to an action to take the deposition of any party to such action during as well as before trial.

Rule 82 of the General Rules of Practice in requiring the applicant to show, in conformity with subdivision 4 of section 872 of the Code of Civil Procedure, that the examination of the party is "material and necessary," is designed to prevent an abuse of such examination by using it for ulterior or improper purposes.

*Code of Civil Procedure*, sections 870, 872, 873, and court rule 82 construed. *Goldmark v. U. S. Electro-Galvanizing Co.*, 526.

2. *Matters not a defense to such application.* When an applicant has complied with the above sections of the Code and with said rule, it is no answer to his application to show that he can subpoena the witness sought to be examined, or that the witness or defendant will stipulate to appear at trial, or that the evidence sought can be obtained through other persons. *Id.*

3. *Laches no bar.* On such application there can be no question of laches, as by the amendment to section 870 of the Code of Civil Procedure such examination can be had during trial. *Id.*

4. *Examination before trial — examination of defendants who deny ownership of car which injured plaintiff.* When, in an action to recover damages for personal injuries, the defendants deny that the car which injured the plaintiff was owned or operated by them, an order for the examination of such defendants before trial should be granted when the plaintiff shows that he has no information on the subject and after diligent inquiry cannot learn where the same can be found. *Watt v. Feltman*, 314.

*Evidence* — privilege of communications to physician not waived by taking deposition of such physician — privilege of physician can only be waived in open court or by stipulation.

*Clifford v. Denver & Rio Grande Railroad Co.*, 513.

**DEPOSITION** — *Continued.*

Creditor's bill to set aside conveyance — evidence — when deposition of grantor on supplementary proceedings casts burden on grantee to disprove fraud — failure to object to such deposition as hearsay.

*Lawrence Brothers, Inc., v. Heylman*, 848.

Lis pendens — when not canceled in action to set aside conveyance — plaintiff's right to relief not determined on affidavit — when deposit of money may be made.

*Wolinsky v. Okun*, 536.

Arrest — action for goods obtained by false representation — when right to arrest may be established by affidavits, though verification of complaint defective.

*Voorhees Rubber Manufacturing Co. v. McEwen*, 541.

**DESCENT.**

Trust deed with remainders to heirs of beneficiary — when heirs to be ascertained at death of beneficiary — adoption — when adopted child is heir and takes trust estate to exclusion of brothers of beneficiary.

*Gilliam v. Guaranty Trust Co.*, 656.

**DEVISE.**

*See* WILL.

**DIRECTOR.**

Of a corporation.

*See* CORPORATION.

**DISCOVERY.**

Life insurance — mutual company without stock is not a stock corporation — mandamus to compel allowance of inspection of list of members not a statutory right — common-law writ in discretion of court — when such writ will be refused.

*People ex rel. Venner v. New York Life Insurance Co.*, 183.

**DIVIDENDS.**

Of a corporation.

*See* CORPORATION.

**DIVORCE.**

*See* HUSBAND AND WIFE.

**DRAINAGE.**

Into watercourses.

*See* WATERCOURSE.

**DURESS.**

Undue influence — action to set aside conveyance of mortgages in trust because of undue influence — presumption of fraud.

*Kelly v. Ashforth*, 922.

**DURESS AND UNDUE INFLUENCE.**

In the making of wills.

*See* WILL.

**EASEMENT.**

Municipal corporations — fee of Fourth avenue in city of New York belongs to city — compensation for depreciation in value of abutting property by erection of railroad viaduct on said avenue.

*Caldwell v. New York & Harlem R. R. Co.*, 164.

Real property — action for damages for injury to value thereof by elevated railway — measure of damages.

*Schmitz v. Brooklyn Union Elevated R. R. Co.*, 308.

Real property — injury to real estate by elevated railroad viaduct not *damnum absque injuria*.

*Wallach v. New York & Harlem R. R. Co.*, 273.

**EJECTMENT.**

*When such action triable before jury although incidental equitable relief is demanded.* A complaint which demands the recovery of possession of lands with an incidental request that the defendant railway in possession thereof be compelled to remove its tracks, and be enjoined from using the same, states a mere action for ejectment and should be tried before a jury. The fact that incidental equitable relief is asked does not deprive the defendant of its right to a jury trial as such relief would be given in the common-law action. *Remsen v. New York, Brooklyn & M. Beach R. Co.*, 418.

Municipal corporations — town of North Hempstead not owner of lands under water south of Saddle Rock in Little Neck bay.

*Town of North Hempstead v. Eldridge*, 789.

**ELECTION.**

Municipal corporations — Election Law construed — aldermen of city of New York empowered to designate newspapers to publish notices — when newspaper can recover for such publication under former designation not revoked.

*Standard Publishing Co. v. City of New York*, 280.

**ELECTRICITY.**

Injury from negligent use thereof.

See NEGLIGENCE.

**ELEVATOR.**

Injury on.

See NEGLIGENCE.

**ELMIRA.**

See MUNICIPAL CORPORATION.

**EMINENT DOMAIN.**

1. *When immediate possession of condemned lands ordered under section 8380 of the Code of Civil Procedure on payment of money.* Immediate possession of condemned lands will be awarded under section 8380 of the Code of Civil Procedure if public interests will be prejudiced by delay, upon the petitioner paying the proper value of the lands into court, even though the answer of the respondent in the proceedings to condemn lands fails to state the value of the lands as contemplated by said section. *Matter of Niagara, Lockport & Ontario Power Co.*, 686.

2. *Construction.* Said section is to be construed in the light of its purpose, which is to enforce an immediate possession of lands condemned when public interest will be prejudiced by delay, and the contestant in such proceedings by refusing to set a value on the lands, by answer or otherwise, cannot be permitted to defeat the object of the statute. *Id.*

3. *Failure of owner of lands to state value thereof.* A deposit of the fair value of the land, as shown by the petitioner by affidavits founded on its assessed value, is sufficient when the contestant at the request of the court refuses to set a value. *Id.*

4. *Said section constitutional.* Section 8380 of the Code of Civil Procedure does not violate section 6 of article 1 of the State Constitution by authorizing the taking of lands without due compensation. The section is intended to insure to the owner the payment of the value. *Id.*

5. *What constitutes public purpose.* The Niagara, Lockport and Ontario Power Company, incorporated to furnish electric power and water to towns, villages and cities and to the people of the State, is organized for a public purpose. *Id.*

6. *When delay prejudicial.* When the plant of the said company is partly constructed and the company is under contract to receive large quantities of electric power from other companies which are ready to deliver, and is also under contract to deliver certain power, and when the transmission of the power in other ways than those contemplated would be dangerous and impracticable, "the public interests will be prejudiced by delay" within the meaning of said section 8380 of the Code of Civil Procedure. *Id.*

Constitutional law — charter of the Niagara County Irrigation and Water Supply Company did not require assent of two-thirds of Legislature — rights of State in waters and bed of Niagara river.

*Niagara County I. & W. S. Co. v. College Heights L. Co.*, 770.

**EMINENT DOMAIN — Continued.**

Municipal corporations — fee of Fourth avenue in city of New York belongs to city — compensation for depreciation in value of abutting property by erection of railroad viaduct on said avenue.

*Caldwell v. New York & Harlem R. R. Co.*, 164.

Municipal corporations — condemnation proceedings for street opening in city of New York — no appeal from order of Special Term sending back report to commissioners for correction.

*Matter of Commissioner of Public Works*, 285.

**EMPLOYERS' LIABILITY ACT.**

Negligence — death of brakeman while coupling defective cars — failure of defendant to promulgate proper rules — recovery by plaintiff sustained — evidence — opinion of expert as to rule properly received — Employers' Liability Act — assumed risk question of fact — extra allowance denied.

*Freemont v. Boston & Maine R. R. Co.*, 831.

Negligence — injury by fall of scaffold — Employers' Liability Act — liability of master for servant exercising superintendence — continuing duty to keep structure safe — freedom from contributory negligence.

*Berthelson v. Gabler*, 142.

**EQUITABLE CONVERSION.**

See CONVERSION.

See REAL PROPERTY.

**EQUITY.**

1. *Creditor's bill* — failure to show conveyance to be fraudulent. In an action by a divorced wife, who has been awarded alimony, to set aside a conveyance by her former husband to his second wife as in fraud of his creditors, there is a total failure to prove fraudulent intent when the plaintiff merely shows that her execution was returned unsatisfied, and that the conveyance was on the consideration of "one dollar, and other valuable considerations." The mere fact of a conveyance to his wife made by a man who is in debt, does not of itself establish fraud. There are two essential elements necessary to fraud: The insolvency of the grantor and the voluntary character of the conveyance. When insolvency is established the burden is on the grantee to show consideration. When both insolvency and want of consideration are shown, the fraud is established. *Wadleigh v. Wadleigh*, 367.

2. *Consideration*. The use of the words "other valuable considerations" is not an admission that the consideration was nominal. *Id.*

3. *Evidence*. The return of an execution unsatisfied a year after the conveyance does not establish insolvency at the time of such conveyance.

Insolvency and indebtedness distinguished. *Id.*

4. *When deposition of grantor inadmissible against grantee*. The deposition of the grantor on supplementary proceedings held after the conveyance is not admissible against the grantee. *Id.*

Trial — suit in equity — new trial ordered when trial justice designated to Appellate Division before signing and filing decision — cause cannot await expiration of such designation — court cannot compel submission of case on former testimony.

*Williamson v. Randolph*, 539.

Injunction to restrain sale of collateral security — when remedy at law adequate — complaint — failure to show irreparable damage and that remedy at law is inadequate.

*Ehrich v. Grant*, 196.

Lis pendens — when not canceled in action to set aside conveyance — plaintiff's right to relief not determined on affidavit — when deposit of money may be made.

*Wolinsky v. Okun*, 536.

Husband and wife — husband's contract for support after separation is enforceable — jurisdiction of Municipal Court of New York.

*Reardon v. Woerner*, 259.

**EQUITY — Continued.**

*Lis pendens* — Code of Civil Procedure, section 1671, construed — specific performance — when *lis pendens* not canceled in such action.

*Tishman v. Acritelli*, 287.

Ejectment — when such action triable before jury although incidental equitable relief is demanded.

*Remsen v. New York, Brooklyn & M. Beach R. Co.*, 418.

Pleading — allegations of conspiracy in action in equity — allegations setting out evidence stricken out.

*Bankers' Surety Co. v. Rothschild*, 130.

Specific performance — when vendor not entitled to reimbursement for taxes paid.

*Kissick v. Rees*, 292.

See ACCOUNTING.

See CREDITOR'S BILL.

See INJUNCTION.

See SPECIFIC PERFORMANCE.

**ESTOPPEL.**

Corporation — liability of directors of credit insurance corporation for investing funds of said corporation in worthless stock of another corporation — when receiver of such corporation not estopped by action of stockholders authorizing such investment.

*Bowers v. Male*, 209.

Suretyship — bond to secure proper performance of contract — when surety is bound by parol waivers of provisions of contract — estoppel of surety.

*Hellman v. City Trust, Safe Deposit & Surety Co.*, 879.

**EVIDENCE.**

1. *When written statement of defendant's witness inadmissible — counsel not entitled to read such statement to witness — power of trial judge — negligence — injury while alighting from train.* The plaintiff was injured by the sudden starting of a train from which he was alighting. In an action to recover damages for said injury,

*Held*, that it was not error to exclude the written statement of defendant's employee as to what he saw of the accident when permission was given to the witness to refresh his recollection therefrom if necessary.

Nor was it error to prohibit defendant's counsel from reading such statement to the witness.

Control of trial judge over the course of trial stated.

Order granting extra allowance reversed. *Finan v. New York Central & Hudson River R. R. Co.*, 888.

2. *Assault and battery — evidence of what plaintiff's daughter, not present at assault, said to one joint defendant not admissible — hearsay.* In an action against joint defendants (the vendor of a piano and men hired by him to remove it from vendee's premises) for an assault committed on the vendee in removing the piano, it is reversible error to admit evidence of what the plaintiff's daughter, who was not present at the assault, said regarding the same on the following day to the servant of the vendor of the piano. Such testimony is hearsay as to both defendants.

Such evidence, which substantiated the plaintiff's testimony, cannot be said to have been without influence on the jury. *Tracey v. Reid*, 396.

3. *Uncorroborated evidence of plaintiff — when truth thereof question for jury although defendant gives no evidence.* In an action for money had and received the only evidence of the payment was the uncontradicted testimony of the plaintiff. The defendant gave no evidence. The plaintiff testified that he gave money to the defendant as a bet on a horse race; that the transaction was three years ago; that he could not tell how defendant looked; that other persons whom he did not produce as witnesses were with him.

*Held*, that as the plaintiff's testimony was uncorroborated, the question of his payment to the defendant was for the jury and that a direction of a verdict for the plaintiff was error. *Mendoza v. Levy*, 449.



**EVIDENCE**—*Continued.*

4. *Pedigree may be proved by hearsay—rules as to the admission of oral and written declarations on questions of pedigree stated.* Pedigree is the history of family descent which is transmitted from one generation to another by both oral and written declarations, and unless proved by hearsay evidence not competent in general issues, it cannot, in most instances, be proved at all. Matters of pedigree consist of descent and relationship evidenced by the declarations as to particular facts such as births, marriages and deaths. In such cases hearsay evidence of declarations to persons, who from their situation were likely to know the facts, is admissible when the person making the declaration is dead. *Layton v. Kraft*, 842.

5. *Relationship.* But before these declarations can be received in evidence it must appear that the person making them was a member of the family whose descent is sought to be traced. Only slight proof of relationship will be required, since the relationship of the declarant with the family might be as difficult to prove as the very fact in controversy. *Id.*

6. *Presumption of identity.* In tracing pedigree identity of name raises a presumption of identity of person where there is similarity of residence or trade, or circumstances, or where the name is an unusual one, and such identity of name being shown, the burden is upon the party denying the identity to show that the name relates to a different person. *Id.*

7. *Partition—church records.* Hence, in an action for partition where the plaintiff is seeking to show his relationship to a deceased owner of the property, and declarations, made by members of the family with whom relationship is sought to be proved, are offered in evidence, it is error to exclude evidence of marriages, deaths and burials of persons alleged to have been the plaintiff's ancestors, as shown by church records entered in books kept for that purpose. *Id.*

8. *Ancient documents.* Such proof should not be excluded merely because the handwriting of the person who made the entries is not proved, or because they were made by the clerk of the church and not by the pastor himself, if such records are ancient documents.

As a general rule an ancient record or document which comes from a custody which the court deems proper, and is itself free from any indication of fraud or invalidity, proves itself.

It is also immaterial that names appearing in said records were spelled in different ways. *Id.*

9. *Privilege of communications to physician not waived by taking deposition of such physician.* Though the plaintiff in an action for damages for personal injuries has taken the deposition of a physician who examined her, it does not constitute a waiver of the privilege secured to such communications, and when such deposition is not offered in evidence by the plaintiff it is error to allow the defendant to introduce it over the objection of the plaintiff. *Clifford v. Denver & Rio Grande Railroad Co.*, 513.

10. *Privilege of physician can only be waived in open court or by stipulation.* As section 834 of the Code of Civil Procedure now stands such privilege can only be waived in open court or by stipulation before trial. *Id.*

11. *Competency.* By virtue of section 911 of the Code of Civil Procedure the competency of the evidence in such deposition does not arise until the trial. *Id.*

12. *When testimony of husband on supplementary proceedings is not admissible in subsequent action against wife.* Evidence given by a husband in supplementary proceedings brought against him, which tends to show that his wife was the real debtor, is not admissible in a subsequent action against the wife, even though she was present at the supplementary proceedings and did not dispute the evidence. *Leggett v. Schwab*, 341.

13. *Admission by silence.* The rule of admission by silence of the truth of statements made in one's presence does not extend to evidence given in judicial proceedings. *Id.*

False imprisonment—evidence—error in excluding rules of institution which permitted imprisonment of plaintiff—evidence that defendants reported their act to the head of institution—error in excluding instructions given to defendants—delegation of power to confine inmates of institution.

*Cunningham v. Shea*, 624.

**EVIDENCE — Continued.**

Sale — conversion — secured debt sold as worthless by assignee for benefit of creditors — mutual mistake of fact — error in excluding evidence that purchaser did not know debt was secured — when sale should be rescinded because minds of parties have not met — counterclaim asking rescission requires reply.

*Flynn v. Smith*, 870.

Creditor's bill to set aside conveyance — evidence — when deposition of grantor on supplementary proceedings casts burden on grantee to disprove fraud — failure to object to such deposition as hearsay — evidence of value of lands — in creditor's action court may set aside deed or declare it to be a mortgage.

*Lawrence Brothers, Inc., v. Heylman*, 848.

Conversion of stock — when transferee of messenger sent for stock liable for conversion — when messenger not clothed with indicia of title — evidence — conversations of messenger with deceased owner of stock excluded — when testimony on rebuttal founded on matter brought out on direct examination.

*Hall v. Wagner*, 70.

Negligence — death of brakeman while coupling defective cars — failure of defendant to promulgate proper rules — recovery by plaintiff sustained — evidence — opinion of expert as to rule properly received — Employers' Liability Act — assumed risk question of fact — extra allowance denied.

*Freemont v. Boston & Maine R. R. Co.*, 831.

Contract — contract of transferrer of stock that corporate debts will be collected — such contract not for benefit of corporation — when no action by corporation lies thereon — proof of assignment of rights of purchaser not admissible unless alleged in complaint.

*Rochester Dry Goods Co. v. Fahy*, 748.

Negligence — membership corporation liable for personal injuries received through negligence of its servants — evidence — statement of member of such corporation to accident insurance company that he was being carried home not conclusive.

*Beecroft v. New York Athletic Club*, 392.

Crime — payment for goods with worthless check — evidence insufficient to sustain conviction for violation of section 529 of the Penal Code — erroneous refusal to charge — jurisdiction, question cannot be raised on conflicting evidence.

*People v. Lipp*, 504.

Contract to pay commissions on fire insurance — no commissions recoverable on insurance furnished to replace canceled policies — evidence — payment of commissions may be shown by judgment roll in former action.

*Tanenbaum v. Federal Match Co.*, No. 2, 416.

Crime — uttering forged note — knowledge of defendant — error in excluding communications made to defendant as to general character of note — when error to admit evidence of other unrelated forgeries.

*People v. Dolan*, 600.

Infants — power of general guardian to sell stock left to infant by will — when price received therefor is adequate — valuation of stock in private business corporation — evidence — when expert opinion as to value excluded.

*Cable v. Cable*, 428.

Corporations — action to determine ownership of stock — findings unwarranted by evidence — written declarations in claimant's own behalf inadmissible — stock certificate book not made evidence by statute.

*Geneva Mineral Springs Co., Limited, v. Steele*, 706.

Former judgment for tort unsatisfied does not bar subsequent action against joint tortfeasor — subsequent action barred only when prior judgment satisfied — reply not necessary to defense of former recovery.

*Reno v. Thompson*, 316.

Partnership — capital contributed by partner to be returned on dissolution before division of profits — evidence insufficient to show that property contributed by one partner became firm property.

*Hillock v. Grape*, 720.

**EVIDENCE—Continued.**

Crime — larceny — admission of evidence of another and unconnected theft by defendant reversible error — confession of defendant to said unrelated theft not admissible against him.

*People v. Sekeson*, 490.

Attorney and client — proof insufficient to show retainer by wife when brought in as party defendant in suit against husband — evidence — objection to narration by witness.

*Aitkrug v. Horowitz*, 420.

Deed — action to set aside conveyance and assignment made by devisee — fraudulent representations by grantee — evidence sufficient to establish legitimacy and title of grantor.

*Cramsey v. Sterling*, 568.

Real property — injury to shade trees by erection of telephone poles — damage recoverable when injury is wanton — when complaint dismissed for failure to show damage.

*Osborne v. Auburn Telephone Co.*, 702.

Executors and administrators — claim against estate for board furnished by decedent's daughter — failure to show promise to pay — when no recovery on *quantum meruit*.

*Conway v. Cooney*, 864.

Accident insurance — failure of beneficiary to show that she was wife of insured as warranted by him — when death of insured by shooting is not accidental.

*Gaines v. Fidelity & Casualty Co.*, 386.

Negligence — injury by bundle of newspapers thrown from moving train — evidence — error in excluding evidence of custom of railroad to permit throwing of papers.

*Clifford v. New York Central & H. R. R. Co.*, 809.

Real property — covenant not to erect tenement house — such covenant not violated by erection of apartment house — burden of proof to show meaning of covenant.

*Marz v. Brogan*, 480.

Negligence — employee killed by passing train on elevated track — assumed risk — contributory negligence — evidence — opinions of one not expert, inadmissible.

*McLaughlin v. Manhattan Railway Co.*, 254.

Carrier of goods — bill of lading constitutes contract — erroneous charge — evidence — statements of carrier's servant made after delivery of goods inadmissible.

*Hoffman v. Metropolitan Express Co.*, 407.

Executors — decree that executor owes debt to estate conclusive — contempt of executor in refusing to pay — burden on executor to show insolvency.

*Matter of Strong*, 281.

Negligence — passenger thrown from car while riding on platform — failure to show negligence of defendant — contributory negligence.

*Kiefer v. Brooklyn Heights R. R. Co.*, 404.

When oral contract for sale of lands not merged in written receipt for deposit — when parol evidence of oral contract admissible.

*Winter v. Friedman*, 306.

Landlord and tenant — eviction by failure of lessor to keep building safe — when damages recoverable for breach of covenant for quiet enjoyment.

*Lindwall v. May*, 457.

Attorney and client — contract for contingent fee sustained — evidence — diary of deceased attorney admissible to show services rendered.

*Burke v. Baker*, 422.

Certiorari to review dismissal of police officer — dismissal upheld — evidence — when cross-examination as to past record is admissible.

*People ex rel. Walters v. Lewis*, 375.

**EVIDENCE—Continued.**

Negligence—injury by set screw in revolving shaft—unsafe place to work—evidence of prior accident—extra allowance improper.

*Walker v. Newton Falls Paper Co.*, 19.

Pleading—allegations of conspiracy in action in equity—allegations setting out evidence stricken out.

*Bankers' Surety Co. v. Rothschild*, 130.

Negligence—evidence of eruptions resulting from injuries to abdomen—when admissible under allegations of complaint.

*Hynds v. Brooklyn Heights R. R. Co.*, 339.

Negligence—injury by fellow-servant—evidence insufficient to show negligence of master in employing said servant.

*Andrews v. Reiners*, 485.

Mortgage—evidence insufficient to show that a painting was covered by mortgage on hotel property.

*Hoffman House v. Barkley (No. 2)*, 564.

Negligence—master and servant—failure of plaintiff to show employment—evidence—burden of proof.

*Davis v. Martin*, 411.

Of notice to municipal corporation of the unsafe condition of a bridge, when sufficient.

*Parks v. City of New York*, 836.

Bills and notes—evidence insufficient to show an indorsement to be without recourse.

*Wood v. Rairden*, 308.

Separation—abandonment—evidence insufficient to show that wife consented thereto.

*Curtin v. Curtin*, 447.

Life insurance—evidence insufficient to show gift of policy to wife.

*Baker v. Metropolitan Life Insurance Co.*, 500.

When written evidence not conclusive.

*Sinclair v. Higgins*, 206.

Of negligence or contributory negligence.

*See NEGLIGENCE.*

**EXAMINATION.**

Of a party before trial.

*See DEPOSITION.*

**EXCESSIVE DAMAGES.**

*See DAMAGES.*

**EXCESSIVE VERDICT.**

In negligence cases.

*See NEGLIGENCE.*

*See TRIAL.*

**EXCISE.**

Offense of selling liquor.

*See INTOXICATING LIQUOR.*

**EXECUTION.**

Conversion by sheriff selling under execution.

*Sloan v. National Surety Co.*, 94.

**EXECUTOR AND ADMINISTRATOR.**

1. Contract by decedent to pay annuity to friend—when consideration sufficient—infancy—when such contract made by infant ratified at majority—when such contract governed by law of this State. The plaintiff, an intimate friend, companion and attendant of the decedent, was given a contract by the decedent by which the decedent promised to pay an annuity to plaintiff. The first memorandum of this contract was in the form of letters between the parties written at a time

**EXECUTOR AND ADMINISTRATOR — Continued.**

when the promisor was an infant. Subsequently on the marriage of the promisor while still an infant, a formal sealed contract was executed to which the husband and father of the infant were also parties and assumed a personal liability thereon. The consideration stated was the obligation of the prior agreement, services heretofore performed by the promisee and one dollar in hand paid. From that time until the death of the promisor some years after attaining her majority payments were made regularly on said contract. In an action to enforce the contract against the administrator of the promisor,

*Held*, that the agreement was founded upon a valuable consideration consisting of the care and attendance rendered by the promisee to the decedent and subsequent services rendered to her brother; that the value of the services as compared with the amount of the annuity was immaterial; that the promisor alone was competent to set the value of said services; that the prior agreement made by letter during the infancy of the promisor, although voidable, furnished a consideration for the formal contract made in lieu thereof;

That, although both contracts were executed during the infancy of the promisor, the ratification thereof at her majority was fully established, as the annuity was paid for eight years after the promisor's majority and until her death;

That the validity of the ratified contract of an infant is not to be determined by the question as to whether it is to her benefit or prejudice.

*Held*, further, that the recitals of the consideration in the agreement, although made by an infant, were binding and were evidence against her estate because said contract was ratified at the promisor's majority. It is only when there is no ratification that an infant is not estopped by recitals of consideration in an instrument;

*Held*, further, that, although the decedent had removed to England after her marriage, the contract being executed and ratified in this State, and to be performed here, was governed by the law of this State.

*Held*, further, that, although the promisor had also made a provision for the promisee by will, the question as to whether such provision was to be in lieu of the contract could not arise unless the defense were pleaded, when there is nothing in the record to show that the plaintiff claimed both provisions.

*Pursons v. Teller*, 837.

2. *Claim against estate for board furnished by decedent's daughter — failure to show promise to pay — when no recovery on quantum meruit.* The plaintiff, a married woman, who had lived with her father in his house, which she managed for the mutual benefit of her own family and her father, and for which she paid no rent, made a claim against his estate for board furnished during his life. The referee made no finding that the decedent ever promised to pay the plaintiff any sum whatever for the board furnished, or that the plaintiff ever promised to pay anything for the use of the house furnished by the decedent. It was also shown that she had never presented a bill for the board furnished, although she had made out a bill during his lifetime.

*Held*, that upon the facts found no action arose against the father to pay upon a quantum meruit;

That evidence of an alleged conversation between the decedent and the claimant's husband, in which decedent said that he thought it would be cheaper for him to board with the plaintiff, and that he would pay her three dollars and fifty cents a week, and other evidence of the plaintiff's daughters substantially to the same effect, was inconsistent with an agreement to pay what the board was worth, and that such evidence was insufficient to show a definite promise to pay;

That as between father and daughter living in the same family an express contract to pay for board must be established by clear and convincing proof;

That a judgment for the claimant should be reversed on the law and the facts.

*Conway v. Cooney*, 864.

3. *When executor cannot avail himself of Statute of Limitations on an accounting.* An executor in possession of trust funds which he has failed to turn over to a trustee named in the will cannot set up the Statute of Limitations in a proceeding by the beneficiaries to compel him to account. The statute does not commence to run in favor of an executor until he openly repudiates the trust and asserts and exercises individual ownership over the property, and the question as to whether the statute has run will not be decided until after an accounting. *Matter of Ashwin*, 176.

**EXECUTOR AND ADMINISTRATOR — Continued.**

4. *Consent that claim against estate be determined by surrogate — when action on claim barred by such consent.* When a claimant against an estate, whose claim has been rejected, has by agreement with the executors filed a consent that the claim be determined by the surrogate on the final accounting pursuant to section 1822 of the Code of Civil Procedure, such claimant cannot maintain an action at law on the claim after the six months' Statute of Limitations has run. The claimant is restricted to the mode of trial agreed upon. *Clark v. Scovill*, 35.

5. *Accounting. It seems,* that if the executors neglect unreasonably to account, such claimant may compel an accounting under section 2727 of the Code of Civil Procedure, or the surrogate may compel the accounting on his own motion under section 2726 of said Code. *Id.*

6. *Decree that executor owes debt to estate conclusive — contempt of executor in refusing to pay.* A decree that an executor owes a debt to an estate and directing him to pay the same is, by virtue of sections 2714 and 2552 of the Code of Civil Procedure, conclusive that he has money in his hands, and, on his refusal to pay, payment may be compelled by contempt proceedings under section 2555 of the Code of Civil Procedure. *Matter of Strong*, 281.

7. *Burden on executor to show insolvency.* In such contempt proceedings the burden is on the executor to show his insolvency, and when he has set up no such defense while contesting his liability to the estate or on successive appeals from the decree, and where his affidavits in answer to a motion to adjudge him to be in contempt do not show that he is unable to pay, an order adjudging him to be in contempt will be sustained.

If insolvent, he may be relieved from imprisonment under section 2286 of the Code of Civil Procedure. *Id.*

8. *When administrator who is superseded by an executor is entitled to commissions.* A permanent administrator appointed before the discovery of a will, and acting in good faith, is entitled to commissions on being superseded by an executor thereafter appointed.

*It seems,* that it is only when an administrator resigns that he loses his right to commissions. *Matter of Hurst*, 460.

9. *Amount of such commissions.* But full commissions are to be allowed only on moneys collected and disbursed. He is only entitled to partial commissions for collecting without disbursing. Paying over to the executor is not disbursing the fund.

Neither are moneys left in the savings bank as originally deposited by the deceased "collected" by such administrator so as to entitle him to commissions thereon.

Such superseded permanent administrator is not like a temporary administrator entitled to full commissions. *Id.*

Attorney and client — power of surrogate to order reference to determine amount of attorney's compensation for services to executors — personal judgment not authorized in such proceedings.

*Matter of Smith*, 23.

**EXEMPLARY DAMAGES.**

*See DAMAGES.*

**EXPERT.**

Evidence of.

*See EVIDENCE.*

**EXTRA ALLOWANCE.**

*See COSTS.*

**FALSE IMPRISONMENT.**

*Evidence — error in excluding rules of institution which permitted imprisonment of plaintiff — evidence that defendants reported their act to the head of institution — error in excluding instructions given to defendants — delegation of power to confine inmates of institution.* In an action for false imprisonment it was shown that the plaintiff, an inmate of a county house, was using obscene and profane language in the engine room of the institution, and threatening with a knife the defendants, who were employed as engineers. They thereupon placed him in a room

**FALSE IMPRISONMENT** — *Continued.*

designed for the confinement of refractory inmates. On appeal from a judgment for the plaintiff.

*Held*, that the exclusion of the rules of the institution providing that punishment should be inflicted on inmates guilty of "disorderly conduct, profane or obscene language," etc., was reversible error, as under the circumstances said rules were in justification of the act of the defendants.

Inmates of such institutions are amenable to its rules and confinement for unruly conduct is not false imprisonment.

So, too, it is error to exclude evidence that the defendants had reported their act to the keeper and were by him directed to keep the plaintiff in the cell, for the imprisonment was then the act of the keeper, while the damages claimed in the action were not limited to the act of placing the plaintiff in the cell, but for keeping him there an entire day.

It is error to exclude evidence of instructions given by the keeper to the defendants relative to the care of inmates and enforcement of the rules, for such evidence tends to show that the defendants were acting according to directions and were charged with the duty of looking after inmates. Such evidence should not be excluded because the plaintiff waives his claim to punitive damages, as the evidence would explain the action of the defendants.

*Held*, further, that in such institutions power to enforce its rules may be delegated to subordinates. *Cunningham v. Shea*, 624.

**FALSE REPRESENTATIONS.**

*See* FRAUD.

**FELLOW-SERVANTS.**

Negligence of.

*See* NEGLIGENCE.

**FELONY.**

*See* CRIME.

**FINDINGS.**

On a trial.

*See* TRIAL.

**FIRE.**

Insurance against.

*See* INSURANCE.

**FIRM.**

*See* PARTNERSHIP.

**FORECLOSURE.**

Of a mortgage.

*See* MORTGAGE.

**FOREIGN JUDGMENT.**

*See* JUDGMENT.

**FOREIGN LAW.**

*See* CONFLICT OF LAW.

**FORGERY.**

*See* CRIME.

**FRAUD.**

*Arrest — action for goods obtained by false representation — when right to arrest may be established by affidavits, though verification of complaint defective.* When a complaint alleges that in order to induce the plaintiff to make a sale and delivery of goods to the defendant, and with intent to defraud it of said goods the defendant falsely and fraudulently represented that he had formed a copartnership with one M., who was a man of large resources, when in truth said M. and the defendant had not formed a copartnership, and when such facts are also established by affidavits used on a motion to obtain the arrest of the defendant, said order of arrest will not be vacated, although the verification of the complaint be defective because taken by a notary in New Jersey, whereas the venue was laid in New York.

**FRAUD — Continued.**

Such complaint is good as an unverified complaint, and section 557 of the Code of Civil Procedure allows the facts necessary to an arrest in such action to be shown by affidavit. *Voorhees Rubber Manufacturing Co. v. McEwen*, 541.

Corporation — liability of directors of credit insurance corporation for investing funds of said corporation in worthless stock of another corporation — when receiver of such corporation not estopped by action of stockholders authorizing such investment.

*Bowers v. Male*, 209.

Statute of Limitations — when foreclosure barred — renewal mortgage executed when mortgagor had no title — when running of Statute of Limitations not stopped by such fraud — complaint failing to allege fraud.

*Keese v. Dewey*, 16.

Lis pendens — right thereto determined by complaint — when cancellation of lis pendens refused — merits of action not determined on motion to cancel lis pendens.

*Lindheim & Co. v. Central Nat. Realty & Construction Co.*, 275.

Deed — action to set aside conveyance and assignment made by devisee — fraudulent representations by grantee — evidence sufficient to establish legitimacy and title of grantor.

*Cramsey v. Sterling*, 568.

Stockholder's action to recover corporate assets dissipated by fraud — when prior demand that corporation bring action not necessary — proper parties defendant.

*Weber v. Wallerstein (No. 1)*, 693.

Undue influence — action to set aside conveyance of mortgages in trust because of undue influence — presumption of fraud.

*Kelly v. Ashforth*, 922.

Creditor's bill — failure to show conveyance to be fraudulent — evidence — when deposition of grantor inadmissible against grantee.

*Wadleigh v. Wadleigh*, 367.

Pleading — allegations of conspiracy in action in equity — allegations setting out evidence stricken out.

*Bankers' Surety Co. v. Rothchild*, 130.

Will — charge — when error to charge that jury may find testamentary incapacity.

*Niemann v. Cordtmeyer*, 326.

See WAIVER.

**FRAUDULENT CONVEYANCE.**

1. *Creditor's bill to set aside conveyance — evidence — when deposition of grantor on supplementary proceedings casts burden on grantee to disprove fraud.* When in a creditor's suit to set aside a conveyance as in fraud of creditors, or in the alternative to have it adjudged to be a mortgage, the deposition of the grantor taken in supplementary proceedings, showing that the consideration was grossly inadequate, has been introduced in evidence, without proper objection on the part of the grantee, the burden is cast upon a grantee, related to the grantor, by such proof of inadequacy of price, to rebut the presumption of fraud raised by such evidence and to show that she was a purchaser in good faith for a valuable consideration. *Lawrence Brothers, Inc., v. Heylman*, 848.

2. *Failure to object to such deposition as hearsay.* When the only objection of the grantee to the introduction of such deposition was that it was not properly authenticated, which objection was not well taken, and when she later introduced the deposition in her own behalf, she cannot subsequently object that it was hearsay as against her. *Id.*

3. *Probative force.* Moreover, such deposition casting the burden upon the grantee to disprove fraud cannot be said to lack probative force against her. *Id.*

4. *Evidence of value of lands.* It is not error to admit evidence of the compensation paid for one-half of the lands which were taken upon condemnation proceedings when the price proved shows that the consideration in the deed was grossly inadequate. *Id.*



**FRAUDULENT CONVEYANCE—Continued.**

5. *In creditor's action court may set aside deed or declare it to be a mortgage.* In such action the court is not bound either to let the deed stand or set it aside absolutely. It may declare it to be a mortgage, and the grantee cannot complain of such latter decree, which is more favorable to her. *Id.*

**GAMING.**

Crime—playing "craps" in vacant lot without breach of the peace is not criminal.

*People v. McDermott*, 380.

**GIFT.**

*When gift of savings bank deposit is in trust to pay over to beneficiaries.* A colored servant, dying at the house of her employer, executed and acknowledged an instrument directed to a savings bank where she had a deposit, requesting the bank to add the name of her employer to her book "without any restrictions," in order that he might "be able to use and pay out the money," etc. At the same time she delivered the bank book to the defendant, her employer. Several witnesses testified that the defendant admitted that the transaction was made for the benefit of some colored children, godchildren of the donor, and that he had accepted the same in trust for them. It was shown that the donor had often said that she wanted the money to go to said children. In the light of the whole situation as specifically set forth in the opinion,

*Held*, that the gift was in trust for the benefit of said children, and that the defendant should pay over the moneys, less the legitimate funeral expenses;

That the trust was not continuing in, its nature, but for the sole purpose of paying over to the beneficiaries. *Mann v. Shrive*, 452.

Life insurance—evidence insufficient to show gift of policy to wife.

*Baker v. Metropolitan Life Insurance Co.*, 500.

**GUARANTY.**

Contract of.

*See CONTRACT.*

**GUARDIAN AND WARD.**

*Infants—power of general guardian to sell stock left to infant by will.* The general guardian of infants who are legatees of personal property consisting of specific stock has power to sell such stock at a price which is adequate.

Hence when such infants are left stock in a private corporation the guardian may sell the same to other legatees managing the business if the price be fair. Such sale at most is voidable on the ground that the price was inadequate. *Cable v. Cable*, 426.

**HABEAS CORPUS.**

To determine custody of child pending action for divorce.

*People ex rel. Larson v. Larson*, 473.

Criminal law—when certificate of conviction sufficient.

*People ex rel. Bidwell v. Pitts*, 319.

Criminal law—when certificate of conviction sufficient.

*People ex rel. Cook v. Pitts*, 321.

**HEARSAY EVIDENCE.**

*See EVIDENCE.*

**HEIR.**

Right of, to inherit.

*See DESCENT.*

**HIGHWAY.**

1. *Highway Law—highway commissioners may waive notice of application to lay out road.* In a proceeding to lay out a new highway, highway commissioners, though entitled by section 83 of the Highway Law to five days' notice of the application, waive the failure to serve said notice by appearing before the County Court without making objection. Said provision for notice is one that may be waived by the person entitled thereto although he be a public officer. *Matter of Wood*, 781.

**HIGHWAY — Continued.**

2. *When public officers may waive statutory provisions.* Waiver of statutory provisions by public officers considered and the rule stated. *Id.*

Municipal corporations — commissioner of highways of city of New York is without authority to employ engineer on commission to draw plans for entrance to Grand Boulevard.

*Hildreth v. City of New York*, 68.

**HUSBAND AND WIFE.**

1. *Divorce — when correspondent appearing in action not entitled to retrial of issues — Code of Civil Procedure, section 1757, construed.* The appearance of a correspondent in an action for divorce pursuant to the permission granted by subdivision 2 of section 1757 of the Code of Civil Procedure does not invalidate the proceedings in such action prior to his appearance, and he is not entitled to a new trial of issues already disposed of.

While it seems that the court would have power to order a new trial on the intervention of such correspondent if necessary to give him a hearing for his protection, such new trial will not be granted when the correspondent, before his personal appearance in the action had full knowledge thereof and was a witness at the trial.

Rights of an intervening correspondent discussed. *Boller v. Boller*, 240.

2. *Annulment of marriage — marriage annulled when wife is under age of legal consent — woman may sue under section 1743 of the Code of Civil Procedure.* An action by a woman to annul a marriage lies under section 1743 of the Code of Civil Procedure when the plaintiff had not at the time of marriage attained the age of legal consent set at eighteen years by the Domestic Relations Law, article 1, section 4. This is so although the parties have cohabited and the parents of the plaintiff consented to the marriage.

A woman is not compelled to bring her action under section 1742 of the Code of Civil Procedure. *Wander v. Wander*, 189.

3. *Decree — short form not proper.* In such action the short form of decision is not proper since the amendment to section 1022 of the Code of Civil Procedure made by Laws of 1903, chapter 85, and such short decision will be sent back for correction to conform it to the requirements of said section as amended. *Id.*

4. *Divorce — temporary alimony not proper while prior award of alimony in action for separation stands.* While a judgment for alimony obtained by a wife in a former action brought by her for separation remains in force the court has no power to grant her temporary alimony as defendant in an action for absolute divorce.

The former decree measures the husband's obligation for support.

Though the court may have power to modify such former decree, it can only be done by application in that action. *Schmalholz v. Schmalholz*, 548.

5. *Excessive counsel fees.* When in the action for absolute divorce the defendant wife denies the allegations and recriminates, counsel fees are proper, but an award of \$1,000 is excessive. Counsel fees reduced to \$500. *Id.*

6. *Separation — abandonment — evidence sufficient to show that wife consented thereto.* In an action for separation brought by a wife on the ground of abandonment, her testimony that she did not now want her husband to come back, that she was satisfied when he left the house, that she would not go back to him, etc., does not show a consent to the abandonment which prevents a decree of separation when the evidence as a whole shows that, when the husband announced his intention to go, she asked him to support her. *Curtin v. Curtin*, 447.

7. *Words and acts considered.* The mental state of the plaintiff is not a substitute for her words and acts at the time of the abandonment.

Alimony reduced. *Id.*

8. *Husband's contract for support after separation is enforceable.* The rule that the contract of a husband to support his wife made after a separation is enforceable was not altered by section 21 of the Domestic Relations Law providing that a husband and wife cannot contract to relieve the husband from his liability to support his wife. *Reard n v. Woerner*, 259.

9. *Jurisdiction of Municipal Court of New York.* An action on such contract is not necessarily in equity and the Municipal Court of the city of New York has jurisdiction. *Id.*

**HUSBAND AND WIFE**—*Continued.*

Deed—action to set aside conveyance and assignment made by devisee—fraudulent representations by grantee—evidence sufficient to establish legitimacy and title of grantor.

*Cramsey v. Sterling*, 568.

Attorney and client—proof insufficient to show retainer by wife when brought in as party defendant in suit against husband—evidence—objection to narration by witness.

*Altkrug v. Horowitz*, 420.

Accident insurance—failure of beneficiary to show that she was wife of insured as warranted by him—when death of insured by shooting is not accidental.

*Gaines v. Fidelity & Casualty Co.*, 386.

Evidence—when testimony of husband on supplementary proceedings is not admissible in subsequent action against wife.

*Leggett v. Schwab*, 341.

Creditor's bill—failure to show conveyance to be fraudulent—evidence—when deposition of grantor inadmissible against grantee.

*Wadleigh v. Wadleigh*, 367.

Preferred cause—husband failing to pay alimony not entitled to preference in action for divorce.

*Fennessy v. Fennessy*, 181.

Contempt proceedings—failure to pay alimony—waiver of right to the amount granted in judgment.

*Compton v. Compton*, 923.

Life insurance—evidence insufficient to show gift of policy to wife.

*Baker v. Metropolitan Life Insurance Co.*, 500.

Habeas corpus to determine custody of child pending action for divorce.

*People ex rel. Lawson v. Lawson*, 473.

When husband not necessary party to wife's deed.

*Vines v. Clarke*, 12.

**ICE.**

Causing fall on sidewalk.

*See* NEGLIGENCE.

**ILLEGITIMACY.**

Deed—action to set aside conveyance and assignment made by devisee—fraudulent representations by grantee—evidence sufficient to establish legitimacy and title of grantor.

*Cramsey v. Sterling*, 568.

**INCOMPETENT PERSON.**

1. *Lunatic—committee cannot authorize sale of timber on lands of lunatic without permission of court.* The committee of a lunatic cannot alien, mortgage or otherwise dispose of the real property of the lunatic, except to lease it for a term not exceeding five years, without the special direction of the court obtained in proceedings brought for that purpose. *Scribner v. Young*, 814.

2. *Committee entitled to recover value of timber so cut, although the defendant has paid therefor to the husband and son of the lunatic.* Hence, persons who have cut timber on the lands of a lunatic under an unauthorized contract with her husband and son, and with the permission of the committee, are liable for the value thereof to the successor of said committee, although they have paid therefor in good faith to the husband and son. In such case a verdict for the plaintiff should be directed. *Id.*

3. *Power to authorize payment.* As the committee has no power to authorize the cutting of the timber so he has no power to authorize the purchasers to pay the value thereof to third persons. *Id.*

**INDEMNITY.**

Membership life insurance association—change of beneficiary under by-laws—failure of insured to give indemnity on changing beneficiary—indemnity waived by insurer. *Stronge v. Supreme Lodge*, 87.

**INDICTMENT.**

Criminal law — when withdrawal of counts in an indictment does not invalidate conviction under remaining counts — *nolle prosequi* abolished.

*People v. Lewis*, 558.

See CRIME.

**INFANT.**

Executors and administrators — contract by decedent to pay annuity to friend — when consideration sufficient — infancy — when such contract made by infant ratified at majority — when such contract governed by law of this State.

*Parsons v. Teller*, 637.

Rights and duties of guardian of.

See GUARDIAN AND WARD.

Death of, through negligence.

See NEGLIGENCE.

See HUSBAND AND WIFE.

**INHERITANCE.**

See DESCENT.

**INHERITANCE TAX.**

See TAX.

**INJUNCTION.**

1. *To restrain sale of collateral security — when remedy at law adequate — complaint — failure to show irreparable damage and that remedy at law is inadequate.* The plaintiff, a promoter of a mining syndicate, pledged to the defendant certain subscription rights, valued at a premium, as security for a note given to defendant for sums advanced by him to buy said subscription rights for the plaintiff. In an action to restrain the defendant from selling said pledged subscription rights on a default in payment of the note, it was alleged that the defendant had agreed to carry the plaintiff's subscription rights until their value could be ascertained on the winding up of the syndicate; that the value of said rights could not now be ascertained, and that a sale thereof would cause irreparable damage to the plaintiff, and that he had no adequate remedy at law.

*Held*, that in the absence of allegations that the defendant was unable to meet any damage caused by said sale, the plaintiff's remedy at law was adequate, because there was a market price for the subscription rights, they having been bought and sold, and that a temporary injunction restraining the sale of the securities should be vacated;

That said allegations of irreparable damage were mere conclusions of law. *Ehrich v. Grant*, 196.

2. *Landowner restrained from encroaching on street by windows and portico — restrictive covenant by landowners to set back building line.* When the predecessors in title of adjoining owners have entered into a restrictive covenant or "set-back agreement" as to lands facing a park, which covenant by its terms runs with the land, and which provides that said owners shall forever keep the sidewalks on their land unincumbered, and that the building line shall be set back ten feet from the line laid out by the municipality, and that no owner shall build any structure other than such as is permitted by the law to be built between what is known as the exterior house line and the exterior area or stoop line, etc., an owner will be restrained *pendente lite* from erecting bay windows and a portico extending three feet out from said set-back line, although a license therefor has been obtained from the municipal authorities. *Williams v. Silverman Realty & Construction Co.*, 679.

3. *Temporary injunction improper.* But the removal of portions of such encroaching structures already built should not be compelled by temporary injunction, but should be left for the final decree. *Id.*

4. *Pendente lite — when assignee of lease entitled to injunction to restrain landlord from interfering with his possession.* The assignee of a lease not containing restrictions against assignment may have an injunction *pendente lite* under section 603 of the Code of Civil Procedure to restrain the landlord from excluding such assignee from the premises if the complaint sets out facts showing that the remedy at law is not adequate. *Goldman v. Corn*, 674.

**INJUNCTION** — *Continued.*

5. *Complaint insufficient which fails to allege facts showing remedy at law is inadequate.* But, as ordinarily a tenant's remedy at law is adequate, a complaint praying for such injunction is not sufficient to warrant the granting of the same when it does not set out facts showing the inadequacy of the remedy at law. A mere allegation that plaintiff will sustain irreparable damage and has no adequate remedy at law is insufficient. *Id.*

6. *Affidavits insufficient.* Accompanying affidavits are not sufficient to show said facts, as under section 603 of the Code of Civil Procedure the right to the injunction in such action must appear upon the face of the complaint. *Id.*

Landlord and tenant — action to restrain landlord from interfering with use of furnace by tenant — use of furnace included in the word "appurtenances" — temporary injunction.

*Stevens v. Taylor*, 561..

Real property — injury to shade trees by erection of telephone poles — damage recoverable when injury is wanton — when complaint dismissed for failure to show damage.

*Osborne v. Auburn Telephone Co.*, 702.

Real property — covenant not to erect tenement house — such covenant not violated by erection of apartment house — burden of proof to show meaning of covenant.

*Marx v. Brogan*, 480.

Partnership to speculate in lands — injunction — when carrying out of contract of sale made by one partner will not be enjoined.

*Babcock v. Leonard*, 294.

Action to restrain the taking of easements of light, air, etc., by erection of elevated railroad viaduct.

*Caldwell v. New York & Harlem R. R. Co.*, 164.

Real property — action for damages for injury to value thereof by elevated railway — measure of damage.

*Schmitz v. Brooklyn Union Elevated R. R. Co.*, 308.

Real property — injury to real estate by elevated railroad viaduct not *damnum absque injuria*.

*Wallach v. New York & Harlem R. R. Co.*, 273.

**INJUNDO.**

See LIBEL.

**INSURANCE.**

1. *Life insurance — evidence insufficient to show gift of policy to wife.* The plaintiff, the second wife of the insured, claimed that a policy of insurance on her husband's life had been given to her in consideration of her promise to marry him. The policy named the former wife of the insured as beneficiary and no change of beneficiaries was shown to have been made. The only evidence that the policy was ever given to the plaintiff was the testimony of a witness that in 1901 the insured said that, if the plaintiff were to marry him, he had nothing else to offer her but his insurance, and that his only desire was that none of his children should get it. The plaintiff did not marry the insured until 1904. There was no proof of the delivery of the policy.

*Held*, that there was a total failure to establish a gift of the policy to the plaintiff, and that she was entitled to the proceeds thereof only as administratrix of the insured. *Baker v. Metropolitan Life Insurance Co.*, 500.

2. *Fire insurance — when mortgagor who bids in property on foreclosure entitled to indemnity for loss accruing prior to delivery of deed.* On the execution of a mortgage the title remains in the mortgagor, and the mortgagee, though he bid in the property on foreclosure, has merely a lien until such time as a formal conveyance by the referee vests him with title.

Hence, when such mortgaged property is insured, "loss, if any, payable to \* \* \* mortgagee as interest may appear," and it is provided that the insurance shall not be invalidated by foreclosure or other proceedings or notice of sale, nor by any change in the title, such mortgagee is entitled to be indemnified for damage to his interest as mortgagee by a fire which occurred after the date

**INSURANCE — Continued.**

he had bid in the property on foreclosure, but before the delivery of the deed by the referee. *Uhlfelder v. Palatine Insurance Co., Limited*, 57.

3. *Measure of damages when mortgagee assigns part interest in bid before loss by fire.* It seems, that had the property been bid in before the fire by another party, the mortgagee could not have recovered from the insurance company as the property, at its full value, would have been applied to the extinguishment of the debt.

When, however, such mortgagee, before the fire and prior to the delivery of the deed, has assigned two-thirds of his bid to others, the damage to his security by such fire is one-third of the total damage to the property. *Id.*

4. *Life insurance corporation — when sale of assets to other corporation valid.* While a hopelessly insolvent corporation must wind up its affairs in the manner prescribed by law, and while corporations doing a profitable business owe a duty to the public to continue their functions, nevertheless a life insurance company not insolvent in a commercial or insurance sense, when doing a losing business and unable to continue without further loss, may, by a contract made in good faith for the best interests of its creditors and stockholders, sell out its business to another corporation and cease operations. *Raymond v. Security Trust & Life Insurance Co.*, 191.

5. *Cancellation of sale unwarranted.* Although after a sale of the corporate business under such circumstances certain small sums due employees stand unpaid through inadvertence, the fact does not warrant a decree setting aside said agreement turning over the assets in an action by an employee whose claim has in fact been paid. *Id.*

6. *When Superintendent of Insurance not personally liable for allowing substitution of bonds deposited in his department.* In the absence of evidence of bad faith, the State Superintendent of Insurance is not personally liable for the difference in value between United States bonds which he allowed to be withdrawn from deposit in his department, and the value of other bonds substituted therefor, if the value of the latter is \$100,000, for the law only requires that bonds of said value be on deposit in said department. *Id.*

7. *Membership life insurance association — change of beneficiary under by-laws.* When the certificate of membership and the rules and regulations of a membership life insurance association provide that a member may change his beneficiary "as often as desired, consent of the existing beneficiaries not being required," etc., a beneficiary first named, and who refuses to surrender the policy intrusted to her, acquires no vested rights which prevent a change of beneficiary by the member on his complying with the provisions of the association in that respect. *Stronge v. Supreme Lodge*, 87.

8. *Failure of insured to give indemnity on changing beneficiary.* Although the rules of such insurer require the insured to furnish indemnity in case he is unable to surrender the policy when changing a beneficiary, such provision is for the security of the association only and the failure of the member to furnish such indemnity when required cannot be taken advantage of by a former beneficiary when the insured has in other respects complied with the rule. *Id.*

9. *Indemnity waived by insurer.* The insurer may waive provisions designed only for its own protection. *Id.*

10. *Life insurance — mutual company without stock is not a stock corporation — mandamus to compel allowance of inspection of list of members not a statutory right.* As the New York Life Insurance Company is a mutual company, without stock, it is not within the provisions of section 29 of the Stock Corporation Law, requiring stock corporations to keep a book containing a list of stockholders and to allow an inspection thereof. Hence a policyholder in said company has no statutory right to a mandamus requiring said company to allow an inspection of its list of policyholders.

Legal position of policyholders in said company discussed. *People ex rel. Verner v. New York Life Insurance Co.*, 183.

11. *Common-law writ in discretion of court.* Apart from said statute, however, there is a common-law right to an inspection by a policyholder of the list of members, and mandamus may issue to enforce the same. But the issuance of

**INSURANCE — Continued.**

such common-law writ is not a matter of right, but rests in the discretion of the court. *Id.*

12. *When such writ will be refused.* When in an application for such common-law mandamus by a policyholder and ninety-one other policyholders it appears that the only list of policyholders kept by said company is on cards which contain not only the policies in force, but those which have expired, and contains also the amounts of said policies, the names of beneficiaries and matters of a private and personal nature which such members may not care to have made public, and there are facts tending to show that the petitioner is a professional litigant, the court in the exercise of a sound discretion should deny the issuance of such writ. *Id.*

13. *Accident insurance voided by false warranty.* A policy of accident insurance is void if the warranty made by the insured that the beneficiary was his wife was false. *Guines v. Fidelity & Casualty Co.*, 386.

14. *Failure of beneficiary to show that she was wife of insured as warranted by him.* A verdict that the beneficiary was not the wife of the insured is warranted by the evidence when it is shown that the woman was married to another man, who is still living, and from whom she was never divorced, and there is no proof that he ever absented himself, or that the wife ever made any effort to find out whether he was alive or dead, and there is no evidence of a marriage *in presenti* with the insured, but the evidence shows merely an agreement to live together as man and wife and the entry into illicit relations, and when in addition there is testimony given by the plaintiff on a former trial of the action that she had been married but once, and it appears that she brought an action against the estate of the insured for services rendered as his housekeeper. *Id.*

15. *When death of insured by shooting is not accidental.* When the policy of insurance covers only accidental death and expressly excepts death from injuries intentionally inflicted, a verdict for the defendant is warranted by evidence which shows that the man who shot and killed the insured did so intentionally in self-protection against an attack by the insured.

Testimony establishing that the shooting was intentional considered. *Id.*

Practice — action on life insurance policy — error to dismiss complaint because answer sets out short Statute of Limitations — prior action in County Court discontinued because of lack of jurisdiction — when such discontinuance voluntary under section 405 of the Code of Civil Procedure — when running of Statute of Limitations stopped during such prior action.

*Bannister v. Michigan Mutual Life Insurance Co.*, 765.

Corporation — liability of directors of credit insurance corporation for investing funds of said corporation in worthless stock of another corporation — when receiver of such corporation not estopped by action of stockholders authorizing such investment.

*Bowers v. Male*, 209.

Contract to pay commissions on fire insurance — no commissions recoverable on insurance furnished to replace canceled policies — evidence — payment of commissions may be shown by judgment roll in former action.

*Tannenbaum v. Federal Match Co. (No. 2)*, 416.

**INTERLOCUTORY JUDGMENT.**

*See* JUDGMENT.

**INTOXICATING LIQUORS.**

1. *Liquor Tax Law — when certiorari refused to review right of Commissioner of Excise to make enumeration of inhabitants of city and to increase cost of liquor tax certificate.* Certiorari will not lie to determine the right of the State Commissioner of Excise to take an enumeration of the inhabitants of the city of Schenectady, pursuant to section 11 of the Liquor Tax Law, and to increase the cost of liquor tax certificates in said city, when, since the issue of said writ, a State census of the inhabitants of said city has been taken, and the relator paid the increased sum without a demand that the certificate issue at the former cost, but with a mere protest at said increased cost. *People ex rel. Flynn v. Cullinan*, 82.

**INTOXICATING LIQUORS — Continued.**

2. *Determination not final.* The acts of the State Commissioner of Excise in making such enumeration and in certifying to the county treasurer the increased cost of licenses were not such final determination of the rights of a relator paying said increased cost as entitles him to a common-law certiorari to review such acts. *Id.*

**JUDGE'S CHARGE.**

To the jury.

*See* TRIAL.

**JUDGMENT.**

1. *Former judgment for tort unsatisfied does not bar subsequent action against joint tortfeasor — subsequent action barred only when prior judgment satisfied.* When in an action for trespass, eviction and conversion of property the answer alleges that a former recovery was had for the same torts against a joint tortfeasor, to which answer the plaintiff has not replied, the trial court is not warranted in dismissing the complaint on the introduction in evidence of the judgment roll in the former action. Nothing but satisfaction for the injury by one tortfeasor will relieve a joint tortfeasor from liability in another action, and proof of the former judgment is no proof that it was satisfied. Proof of satisfaction is necessary to dismissal of the complaint. *Reno v. Thompson*, 316.

2. *Reply not necessary to defense of former recovery.* The failure of the plaintiff to reply to the answer is not an admission of the allegation that said judgment was paid, as such defense is not a counterclaim and requires no reply. It sets out merely new matter in avoidance. *Id.*

3. *Res adjudicata — when former judgment in summary proceedings in landlord's favor bars action by tenant to recover sums advanced on option to purchase.* When in an action by a former tenant to recover from his landlord sums alleged to have been paid under an option to purchase, which sums were to be returned or applied on the rent if the tenant elected not to purchase, it is shown that subsequent to the alleged payments the landlord obtained a judgment of dispossession against said tenant in summary proceedings, the same is *res adjudicata* against the plaintiff's claim, as the alleged possession by the landlord of the plaintiff's money would have been a complete defense in said proceedings and was comprehended in the issues. *von der Born v. Schultz*, 263.

4. *Personal judgment unauthorized.* When it is found by the surrogate that the services of an attorney are chargeable as a lien upon the estate there is no authority to direct a personal judgment and execution against the executor as in a common-law action. *Matter of Smith*, 23.

Negligence — liability of city for injuries received through collapse of bridge over excavation in sidewalk — notice to police officer is notice to city — city joint tortfeasor with landowner making excavation under municipal permit — action against city not barred by prior recovery against contractor erecting bridge. *Parks v. City of New York*, 836.

Contract to pay commissions on fire insurance — no commissions recoverable on insurance furnished to replace canceled policies — evidence — payment of commissions may be shown by judgment roll in former action.

*Tanenbaum v. Federal Match Co.* (No. 2), 416.

Annulment of marriage — marriage annulled when wife is under age of legal consent — woman may sue under section 1743 of the Code of Civil Procedure — decree — short form not proper.

*Wander v. Wander*, 189.

Executor — decree that executor owes debt to estate conclusive — contempt of executor in refusing to pay — burden on executor to show insolvency.

*Matter of Strong*, 281.

Parties defendant — under complaint against joint defendants judgment may be had against one only — Code of Civil Procedure, section 1205, construed.

*Laurton v. Partridge*, 8.

Divorce — temporary alimony not proper while prior award of alimony in action for separation stands — excessive counsel fees.

*Schmalholz v. Schmalholz*, 543.



**JUDGMENT** — *Continued.*

Municipal Court of New York — order opening default not reviewable on appeal from judgment which has been vacated.

*Wendin v. Brooklyn Heights R. R. Co.*, 390.

Trust — extra allowance denied to beneficiaries, but allowed to accounting trustee.

*Blair v. Cargill*, 853.

In creditor's action court may set aside deed or declare it to be a mortgage.

*Lawrence Brothers, Inc., v. Heylman*, 848.

**JURISDICTION.**

Power of court.

*See* COURT.

**JURY.**

Ejectment — when such action triable before jury although incidental equitable relief is demanded.

*Remsen v. New York, Brooklyn & M. Beach R. Co.*, 418.

*See* TRIAL.

**LACHES.**

Deposition — examination of officer of corporation — Code of Civil Procedure, sections 870, 872, 878, and rule 82 construed — matters not a defense to such application — laches no bar.

*Goldmark v. U. S. Electro-Galvanizing Co.*, 526.

**LAND.**

*See* REAL PROPERTY.

**LANDLORD AND TENANT.**

1. *Eviction by failure of lessor to keep building safe — when damages recoverable for breach of covenant for quiet enjoyment.* A tenant, holding under a lease with covenant for quiet enjoyment, is entitled to go to the jury in an action for damages for eviction upon evidence showing that the premises, which were undermined by adjoining excavations and were torn down as unsafe, could have been kept safe by proper care on the part of the lessors. Evidence that the lessors were directed, pursuant to the Municipal Building Code, to make the premises safe shows an obligation cast upon the lessors by ordinance, and if the building was torn down as a nuisance owing to their default, such nuisance was attributable to them. *Lindvall v. May*, 457.

2. *Action to restrain landlord from interfering with use of furnace by tenant — temporary injunction.* In an action in equity by a tenant against his landlord under a lease of the basement and parlor floor of premises "with the appurtenances," to procure an injunction restraining the defendant from interfering with the use by the plaintiff of a furnace in the cellar, which is the only means of heating the plaintiff's quarters, an injunction *pendente lite* should be granted. *Stevens v. Taylor*, 561.

3. *Use of furnace included in the word "appurtenances."* Although the lease is silent as to the provisions for heat, it is immaterial because the right to heat with the only means provided therefor is included in the word "appurtenances." *Id.*

4. *Action for use and occupation after notice to vacate.* When a tenant, after notice to vacate, holds over, the landlord may treat him as a trespasser, or as a tenant for another year under the lease. *Stevens v. City of New York*, 362.

5. *When recovery limited to rental stated in lease.* When a complaint in an action for use and occupation alleges that the tenant after such notice to vacate "by and with the consent of the plaintiff used and occupied said premises," an election to treat the defendant as a tenant is shown, and the recovery is limited to the rental stated in the lease. *Id.*

6. *Section 200 of the Real Property Law unavailable.* When a complaint is framed for use and occupation with the consent of the landlord, without reference to section 200 of the Real Property Law, said section is not available in the action. *Id.*

*Injunction pendente lite* — when assignee of lease entitled to injunction to restrain landlord from interfering with his possession — complaint insufficient

**LANDLORD AND TENANT—Continued.**

which fails to allege facts showing remedy at law is inadequate—affidavits insufficient.

*Goldman v. Corn*, 874.

Conversion—agreement by landlord that tenant may store property on premises after expiration of lease—landlord not liable for conversion by reason of removal of such property by new tenant.

*Huntington v. Herrman*, 875.

*Res adjudicata*—when former judgment in summary proceedings in landlord's favor bars action by tenant to recover sums advanced on option to purchase.

*von der Born v. Schultz*, 263.

Negligence—injury to plaintiff by fall through unguarded elevator shaft on demised premises—failure to show negligence of lessor.

*Washington v. Episcopal Church of St. Peter's*, 402.

Damages—interest not recoverable on breach of covenant by tenant to repair—evidence—when objection sufficient.

*Markham v. Stevenson Brewing Co.*, 178.

Assignment—parol assignment of written contract—when assignee can recover thereon—erroneous charge.

*St. Regis Paper Co. v. Page Lumber Co.*, 108.

Nuisance—damages to lessee of adjoining property by operation of electric light plant.

*Bly v. Edison Electric Illuminating Co.*, 170.

**LARCENY.**

See CRIME.

**LEASE.**

See LANDLORD AND TENANT.

**LEGISLATURE.**

Powers of.

See CONSTITUTIONAL LAW.

**LEGITIMACY.**

See ILLEGITIMACY.

**LIBEL.**

1. *Complaint—general allegation that libel referred to plaintiff—Code Civil Procedure, section 535, construed.* The common-law rule which requires the plaintiff in an action for libel to plead facts which connected the publication with him when such publication on its face did not directly or necessarily refer to him, has been abrogated by section 535 of the Code of Civil Procedure. Under said section both in libel and slander the application of the defamatory matter to the plaintiff has been made a question of fact. Such fact may be alleged in general terms, and, if traversed by the answer, the plaintiff at trial must prove that the words referred to him.

*It seems*, that if an article were so general and indefinite that no one reading it could apply it to any particular person, more than a general allegation of its application to the plaintiff might be required. *Nunnally v. Tribune Association*, 485.

2. *When complaint containing general allegation will be sustained on demurrer.* But when it appears upon the face of the complaint that evidence may be given which will undoubtedly connect the plaintiff with the publication, a complaint is sufficient on demurrer which contains the allegation that the article was published of and concerning the plaintiff.

When a complaint shows that the article stated that a young man supposed to be poisoned was "keeping company" with a young woman, whose name and address he gave in his delirium, and that the plaintiff was discharged by her employers by reason of their identifying her with said article, it is not subject to demurrer when it contains the said general allegation, that the article referred to her, allowed by section 535 of the Code of Civil Procedure. *Id.*

3. *Publication wholly facetious cannot be made libelous by innuendo—demurrer to complaint.* When a publication, plainly humorous, relating to the plaintiff

**LIBEL — Continued.**

does not justify an innuendo ascribing to it a libelous meaning, a demurrer to the complaint will be sustained.

When a publication recounts a practical joke played upon the plaintiff, in which he was accused by his companions of being branded with a "Black Hand," and with being a member of a gang known by that name, such publication cannot be made libelous by an innuendo setting out that such gang was composed of assassins, blackmailers, thieves, etc., and a demurrer to the complaint should be sustained. *Lamberti v. Sun Printing & Publishing Assn.*, 437.

4. *When complaint with allegation that libel referred to plaintiff is not demurrable.* Where the plaintiff is not named in an article libelous *per se*, but is indicated by circumstances described in the article, and the complaint contains a general allegation, pursuant to section 535 of the Code of Civil Procedure, that the article was published concerning her, she may at trial show extrinsic facts which would connect her with the article, and the complaint is not subject to demurrer. *Nunnally v. New Yorker Staats-Zeitung*, 482.

5. *When complaint shows such reference.* A contention that the article is so general that no one would understand that it referred to the plaintiff is not sustained when the allegations of special damage contained in the complaint show that plaintiff's employers understood her to be the person referred to, and in consequence thereof discharged her. *Id.*

6. *Article insinuating lewd motives to scientist — complaint based on such article, when not demurrable.* A published article, which insinuates that a scientist, in preferring to take physical measurements of the persons of girls rather than boys, and particularly girls over sixteen years of age, was actuated by indecent and lewd motives, may be libelous, and it is error to sustain a demurrer to a complaint on such publication. The question of the libelous character of such publication is for the jury. *MacDonald v. Sun Printing & Publishing Assn.* (No. 3), 487.

7. *Publication calling scientist a "humbug" and "pseudo-scientist."* A publication stating of a scientist that he is a "patho-social humbug" and a "pseudo-scientist" is calculated to injure such person in his calling, and is libelous *per se*. A complaint in an action for libel thereon is not demurrable. *MacDonald v. Sun Printing & Publishing Assn.* (No. 2), 465.

8. *False publication calling plaintiff "a rogues' gallery man" — legal and express malice distinguished.* Published headlines referring to the plaintiff as "a rogues' gallery man," if false, establish the legal malice which entitles the plaintiff to compensatory damages. *Carpenter v. New York Evening Journal Publishing Co.*, 266.

9. *Proof of express malice essential to recovery of exemplary damages.* But the mere publication of such libel does not entitle the plaintiff to exemplary damages, and in order to recover exemplary damage the burden is upon the plaintiff to establish express malice evidenced by (1) personal ill-will, or (2) such negligence and carelessness as to indicate a wanton or reckless disregard of the rights of others, or (3) being false, the words themselves must be of such character as impute a degree of wrongdoing which calls for punishment in addition to compensation. *Id.*

10. *Erroneous charge.* In an action for libel on the words aforesaid it is error to refuse to charge that the plaintiff, in order to recover exemplary damage, must establish express malice by a fair preponderance of proof.

Legal malice and express malice, distinguished. *Id.*

**LIEN.**

1. *Mechanic's lien — no lien for tearing down buildings under contract to erect other buildings — no recovery on quantum meruit may be had in an action on a mechanic's lien when the lien not established.* A builder under contract to erect a building in the place of old buildings to be demolished by him, and who has merely razed the old buildings and reaped a profit from the sale of the materials to a sub contractor, but has not in any way performed his contract to build, except to draw plans, is not entitled to a mechanic's lien on the breach of the contract by the owner. The demolition of the old buildings is not the perform-

**LIEN — Continued.**

ance of labor for the "improvement of real property" within the meaning of the Lien Law. In an action to foreclose such lien the complaint is properly dismissed and there can be no recovery on a *quantum meruit* under section 3412 of the Code of Civil Procedure, for no personal judgment can be had under said section without establishing some portion of the lien. *Thompson-Starrett Co. v. Brooklyn Heights Realty Co.*, 358.

2. *When architect's certificate necessary.* The plaintiff in such action must fail when he does not allege and prove the issuance of an architect's certificate required by the contract as a condition precedent to payment. *Id.*

3. *Mechanic's lien on public improvement — undertaking to discharge lien may be signed by assignee of contractor — Lien Law construed — when leave to submit new undertaking does not bar appeal from decision holding former bond to be insufficient.* When an application to discharge a mechanic's lien on a public improvement has been denied with leave to renew upon the ground that the bond must, under the statute, be signed by the contractor and cannot be signed by his assignee, such leave does not bar an appeal from such decision as the right to submit a new bond exists without such leave.

The bond authorized to be given to procure the discharge of a lien upon a public improvement by section 20 of the Lien Law, as amended by Laws of 1898, chapter 169, and Laws of 1902, chapter 87, may be signed by the assignee of the contractor, although he is not within the express terms of said section. The section should be liberally construed to secure the beneficial intent and purpose thereof. *Matter of Hudson Water Works*, 860.

4. *Mechanic's lien — damages — when interest not recoverable in action to foreclose lien.* When in an action to foreclose a mechanic's lien certain work has been left undone by the contractor, the cost of completing which affects the amount of plaintiff's recovery, his claim is not liquidated and an allowance of interest on his recovery is not proper. *Fox v. Davidson*, 174.

Attorney and client — substitution of attorneys — attorney retaining lien on papers until payment.

*Anglo-Continental Chemical Works, Limited, v. Dillon*, 418.

**LIFE ESTATE.**

*See* REAL PROPERTY.

**LIFE INSURANCE.**

*See* INSURANCE.

**LIMITATION OF ACTION.**

1. *Statute of Limitations — when foreclosure barred.* When more than twenty years have expired from the time a real estate mortgage became due, a recovery thereon is barred by the Statute of Limitations. Part payments within that time made by some of the mortgagors does not revive the action against a third joint mortgagor who made no payments and who did not authorize such payments. *Keece v. Devey*, 16.

2. *Renewal mortgage executed when mortgagor had no title — when running of Statute of Limitations not stopped by such fraud — complaint failing to allege fraud.* When mortgagors, prior to the execution of a renewal mortgage, a part of the consideration whereof was a balance due on the prior mortgage, had sold the premises, their undiscovered fraudulent act in executing said renewal mortgage cannot be taken advantage of by the mortgagee in order to prevent the running of the Statute of Limitations on said prior mortgage under a complaint which contains no allegations of fraud, but which proceeds wholly on the theory that the mortgagee under the void renewal mortgage should be subrogated to rights under the former mortgage. *Id.*

Practice — action on life insurance policy — error to dismiss complaint because answer sets out short Statute of Limitations — prior action in County Court discontinued because of lack of jurisdiction — when such discontinuance voluntary under section 405 of the Code of Civil Procedure — when running of Statute of Limitations stopped during such prior action.

*Bannister v. Michigan Mutual Life Insurance Co.*, 765.

**LIMITATION OF ACTION** — *Continued.*

Trespass by cutting timber—reservation of right to cut timber construed—when no time set timber must be removed within reasonable time—when such right not acquired by prescription.

*Decker v. Hunt*, 821.

Consent that claim against estate be determined by surrogate—when action on claim barred by such consent.

*Clark v. Scovill*, 35.

Executors—when executor cannot avail himself of Statute of Limitations on an accounting.

*Matter of Ashheim*, 176.

**LIQUOR SELLING.**

Regulation of.

*See* INTOXICATING LIQUOR.

**LIQUOR TAX LAW.**

*See* INTOXICATING LIQUOR.

**LIS PENDENS.**

*See* PRACTICE.

**LUNATIC.**

*See* INCOMPETENT PERSON.

**MANDAMUS.**

Municipal corporation—mandamus to compel reinstatement of superintendent of sewers of borough of Manhattan—said office not created by charter or under power conferred thereby—demurrer to alternative writ sustained—present incumbent of office not necessary party.

*People ex rel. Michales v. Ahearn*, 741.

Municipal corporation—civil service rule of city of New York requiring six months' service before admission to examination for promotion is constitutional—mandamus to compel admission to such examination before such service refused.

*Matter of Ricketts*, 669.

Life insurance—mutual company without stock is not a stock corporation—mandamus to compel allowance of inspection of list of members not a statutory right—common-law writ in discretion of court—when such writ will be refused.

*People ex rel. Venner v. New York Life Insurance Co.*, 183.

**MASTER AND SERVANT.**

False imprisonment—evidence—error in excluding rules of institution which permitted imprisonment of plaintiff—evidence that defendants reported their act to the head of institution—error in excluding instructions given to defendants—delegation of power to confine inmates of institution.

*Cunningham v. Shea*, 624.

Negligence—membership corporation liable for personal injuries received through negligence of its servants—evidence—statement of member of such corporation to accident insurance company that he was being carried home not conclusive.

*Beecroft v. New York Athletic Club*, 392.

Executors and administrators—contract by decedent to pay annuity to friend—when consideration sufficient—infancy—when such contract made by infant ratified at majority—when such contract governed by law of this State.

*Parsons v. Teller*, 637.

Contract of employment on commission—contract construed in light of existing conditions—when plaintiff entitled to commissions on sale of goods removed from his control.

*Hearn v. Stevens & Bro.*, 101.

Slander—words charging one with exacting commissions—complaint—meaning of words dependent on extrinsic facts must be alleged.

*Russell v. Barron*, 382.

**MASTER AND SERVANT — Continued.**

Negligence — injury to hand by roller of paper mill — when risk not obvious or assumed — failure to give instructions.

*Makin v. Pettebone Cataract Paper Co.*, 726.

Negligence — injury by fellow-servant — evidence insufficient to show negligence of master in employing said servant.

*Andreica v. Reiners*, 435.

Negligence — failure of plaintiff to show employment — evidence — burden of proof.

*Davis v. Martin*, 411.

Injury of a servant through negligence.

See NEGLIGENCE.

**MEASURE OF DAMAGES.**

See DAMAGES.

**MECHANIC'S LIEN.**

See LIEN.

**MEMBERSHIP CORPORATION.**

See CORPORATION.

**MERGER.**

Evidence — when oral contract for sale of lands not merged in written receipt for deposit.

*Winter v. Friedman*, 306.

**MISTAKE.**

Sale — conversion — secured debt sold as worthless by assignee for benefit of creditors — mutual mistake of fact — error in excluding evidence that purchaser did not know debt was secured — when sale should be rescinded because minds of parties have not met — counterclaim asking rescission requires reply.

*Flynn v. Smith*, 870.

**MISTRIAL.**

See TRIAL.

**MONEY RECEIVED.**

Evidence — uncorroborated evidence of plaintiff — when truth thereof question for jury although defendant gives no evidence.

*Mendoza v. Levy*, 449.

**MORTGAGE.**

1. *Realty and chattel mortgage securing same debt — agreement that resort shall first be had to the realty mortgage — mortgagors not damaged by violation of said agreement by sale under chattel mortgage which conveyed no interest — counterclaim for such damage properly dismissed in action to foreclose realty mortgage.* When a chattel mortgage given as further security for a debt secured by a mortgage on real estate covers only the personal property "which belongs to us (the mortgagors) in any of the said buildings" and provides that resort shall first be had to the realty mortgage to collect a debt, a sale under such chattel mortgage before an action to foreclose the realty mortgage, which sale only purported to convey the interest of the mortgagors, they having no interest, does not furnish grounds for a counterclaim in a subsequent action to foreclose the realty mortgage. As the chattel mortgagors had no title at the time of the mortgage, and as only their interest in said chattels was sold, nothing passed to the purchaser, and hence the mortgagors were not damaged by the apparent breach of the agreement to resort first to the realty mortgage. *McEchron v. Martine*, 805.

2. *Evidence insufficient to show that a painting was covered by mortgage on hotel property.* When it is a question whether a certain painting called "Love's Surprise" by Scalbert was covered by a mortgage executed by the president of a hotel corporation, through the foreclosure of which the plaintiff claims title, the mere fact that the schedule of property annexed to said mortgage included a "painting by Scalbert" is not sufficient to prove that "Love's Surprise" was the painting intended, when the other evidence shows that said president had

**MORTGAGE—Continued.**

been in possession of said painting and treated it as his private property. *Hoffman House v. Barkley* (No. 2), 564.

3. *Chattel mortgage—when not paid by delivery of defective real mortgage in lieu thereof.* When a chattel mortgage executed by the plaintiff provides that he is to assign to the mortgagee a mortgage on certain real estate in lieu of the chattel mortgage, and the real estate mortgage subsequently assigned does not cover all the premises specified, and when on the discovery of said defect in the latter mortgage the chattel mortgagor agrees to pay the balance unpaid by the foreclosure of the same and said chattel mortgage is not redelivered to the mortgagor, the real estate mortgage is not substituted for the chattel mortgage and the same is still a lien upon the personal property and may be foreclosed by the mortgagee. *Shaw v. Cooke*, 202.

4. *Chattel mortgage—on default mortgagee must take possession or refile mortgage.* The owner of a chattel mortgage not in possession of the property must, when the debt becomes due, either refile his mortgage or take possession of the property in order to protect himself against levy by a judgment creditor of the mortgagor.

Though on default of the mortgagor the title vests in the mortgagee and the mortgagor has only an equity of redemption, the mortgagee to protect his title must take possession. *Sloan v. National Surety Co.*, 94.

5. *When proof of taking possession sufficient.* When the mortgaged property consists of machinery situated in a building leased by the mortgagor, whose lease has expired, except as such mortgagor holds over as monthly tenant, a taking of possession by the mortgagee is established when it is shown that he demanded payment, which was refused, went to the room and claimed the machinery as his, secured a lease of the room containing the machinery from the owner, and employed and paid persons to operate the machinery in finishing up orders. *Id.*

6. *Conversion by sheriff selling under execution—when surety who indemnifies sheriff liable to mortgagee.* When such mortgaged property has after default and such possession by the mortgagee been sold by the sheriff under levy by a judgment creditor of the mortgagor, a surety who has indemnified the sheriff is liable for the conversion, although the original levy was made before the bond of indemnity was given. *Id.*

7. *Specific performance—plaintiff must show performance on his part.* In an action to compel specific performance of a promise to execute a mortgage on real estate to secure a contractor who has erected a building thereon for the owner, it is incumbent on such contractor to show full performance on his part or to justify his failure so to do, and in the absence of such proof the complaint is properly dismissed. *Flanders v. Rosoff*, 1.

8. *When complaint for specific performance not an endable to allow recovery on quantum meruit.* In such action for specific performance it is not error to refuse to allow an amendment to the complaint to enable the plaintiff to recover for the erection of the building as for a *quantum meruit* when no evidence has been introduced showing the value of the work done and materials furnished.

*It seems*, that under such circumstances a recovery for a *quantum meruit* cannot be had under a complaint for specific performance or under an amendment for the purpose of allowing such recovery. *Id.*

9. *Assignor of mortgage who guarantees payment proper party on foreclosure.* The assignor of a mortgage, who guarantees that the assignee shall collect the debt, is a party liable to the plaintiff for the payment of the debt secured by the mortgage and may be made a party to an action to foreclose the same under section 1627 of the Code of Civil Procedure. *Robert v. Kivansky*, 475.

10. *No action against such assignor for deficiency without leave of court—complaint not showing leave of court fails to state cause of action.* Hence, where the assignee has failed to make such assignor a party defendant in an action of foreclosure he cannot maintain a subsequent action against him for a deficiency without the leave of court required by section 1628 of the Code of Civil Procedure. A complaint in such subsequent action against the assignor which does not allege leave of court fails to state a cause of action. *Id.*

Specific performance—when prior false representations of plaintiff waived by defendant—when promise to assign mortgage shown by promise to deliver same

**MORTGAGE—Continued.**

—adequate remedy at law not pleaded — tender — when plaintiff not bound to accept offer to return consideration.

*Urbansky v. Shirmet*, 50.

Fire insurance — when mortgagor who bids in property on foreclosure entitled to indemnity for loss accruing prior to delivery of deed — measure of damages when mortgagor assigns part interest in bid before loss by fire.

*Uhlfelder v. Palatine Insurance Co., Limited*, 57.

Statute of Limitations — when foreclosure barred — renewal mortgage executed when mortgagor had no title — when running of Statute of Limitations not stopped by such fraud — complaint failing to allege fraud.

*Keese v. Dacey*, 16.

**MOTION AND ORDER.**

*Order of publication amended nunc pro tunc.* While an order cannot be made *nunc pro tunc* to supply a jurisdictional defect by requiring to be done something which has not been done, such order may be so corrected when the thing has in fact been done. *Mishkind-Feinberg Realty Co. v. Sudorsky*, 578.

Deposition — examination of officer of corporation — Code of Civil Procedure, §§ 870, 872, 873, and rule 82 construed — matters not a defense to such application — laches no bar.

*Goldmark v. U. S. Electro-Galvanizing Co.*, 526.

*Lis pendens* — when not canceled in action to set aside conveyance — plaintiff's right to relief not determined on affidavit — when deposit of money may be made.

*Wolinsky v. Okun*, 536.

Contempt — order to show cause must be served personally — relief not asked in motion papers cannot be granted.

*Matter of Weeks v. Coe*, 337.

**MUNICIPAL CORPORATION.**

1. *Commissioner of highways of city of New York is without authority to employ engineer on commission to draw plans for entrance to Grand Boulevard.* The Laws of 1896, chapter 57, as amended by Laws of 1897, chapter 679, authorizing the commissioner of street improvements of the twenty-third and twenty-fourth wards of the city of New York to cause maps and profiles to be made showing the location, etc., of an approach to the Grand Boulevard and Concourse in said city, together with the subsequent charter of said city (Laws of 1897, chap. 378, §§ 455, 456, 457, 526), which transferred the powers and duties of said commissioner of street improvements in said wards to the commissioner of highways of said city and authorized such commissioner of highways to appoint a consulting engineer at a salary within the limits of an appropriation duly made therefor, do not empower said commissioner of highways to construct such approach or to enter into or bind the city by a contract with an engineer to make plans for said approach at his own expense, the compensation to be measured by a percentage on the estimated cost thereof.

A plaintiff who has made plans under such unauthorized contract cannot recover the agreed percentage from the city.

Such improvements must first be authorized and approved by resolution of the board of public improvements under section 413 of the charter.

Section 455 of the charter, which permits the commissioner of public highways, when authorized by the board of public improvements, to appoint a consulting engineer, does not authorize the making of a contract with an engineer to make plans at his own expense on commission. *Hildreth v. City of New York*, 63.

2. *Civil service rule of city of New York requiring six months' service before admission to examination for promotion is constitutional.* Rule 15, subdivision 2, adopted by the municipal civil service commission of the city of New York, which provides that those taking examinations for promotion, "shall have served with fidelity for not less than six months, in positions of the same group or general character, in the grade next lower, in the same department," is not in violation of section 9 of article 5 of the State Constitution, providing that "promotions \* \* \* shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations," etc. *Matter of Ricketts*, 669.



**MUNICIPAL CORPORATION — Continued.**

3. *Civil Service Law not violated.* Nor is said rule in violation of the Civil Service Law, which requires that "promotions shall be based upon merit and competition." *Id.*

4. *Mandamus to compel admission to such examination before such service refused.* Hence, a peremptory writ of mandamus to compel the admission of an assistant foreman of the fire department of said city to an examination for promotion before he has served six months in his present grade will be refused. *Id.*

5. *Condemnation proceedings for street opening in city of New York.* The amendments made in the Street Opening Law by section 988 of the charter of Greater New York, expressly allowing an appeal to the Appellate Division by the city or any party aggrieved by the report of the commissioners of estimate on condemnation proceedings for the opening of streets "when confirmed," relate to matters of practice only, and hence allow an appeal from an order confirming such report in a condemnation proceeding instituted before the passage of said amendment. *Matter of Commissioner of Public Works*, 285.

6. *No appeal from order of Special Term sending back report to commissioners for correction.* But said section is confined in its operation to such report when confirmed by the Special Term, and there is no appeal authorized from an order of the Special Term refusing to confirm the report of said commissioners and sending the same back with directions requiring a further report in accordance therewith. Local statutes cited and construed. *Id.*

7. *Negligence — city of New York liable for injuries received by reason of accumulation of ice in front of premises of board of education.* Although the board of education of the city of New York is a corporation independent of the municipal corporation, the city is liable, nevertheless, for damages received from a fall on ice negligently allowed to accumulate on the sidewalk in front of a building occupied by said board of education for school purposes, as the charter of said city imposes on it the duty of keeping its sidewalks in proper condition for public travel. *Pymm v. City of New York*, 330.

8. *Town of North Hempstead not owner of lands under water south of Saddle Rock in Little Neck bay.* The lands under water south of Saddle Rock in the east part of Little Neck bay, in the town of North Hempstead, were not granted to said town by the Dutch patent of November 16, 1664, made by Governor Kieft, or by the patent of March 6, 1666, by Governor Nichols, or by the patent of April 17, 1685, but, on the contrary, the title to such lands remained in the sovereign and is now owned by the State or its grantees. *Town of North Hempstead v. Elbridge*, 789.

9. *Ejectment.* Hence, said town of North Hempstead cannot recover said lands in an action of ejectment brought against the owner of adjoining uplands, who is in the possession of said lands under water.

History of early grants to town of North Hempstead. *Id.*

10. *Not liable for salary of de jure officer while place filled by another.* A police officer who has been reinstated by the court after a dismissal from the police force cannot recover from the municipality the amount of his salary during the period of dismissal when the quota of police officers was full and the city has paid the salary to another *de facto* incumbent of the office; this on the policy that the city shall not pay twice for the same service. *Grant v. City of New York*, 160.

11. *Unnecessary for defendant to show which particular de facto appointee filled plaintiff's place after his dismissal.* The fact that the city cannot point out which of three persons appointed to fill vacancies after the plaintiff's dismissal was actually appointed in the plaintiff's place furnishes no ground for liability. *Id.*

12. *Fee of Fourth avenue in city of New York belongs to city.* Whatever title to the surface of Fourth avenue, between Thirty-eighth and One Hundred and Thirty-fifth streets in the city of New York, may have been acquired before 1850 by the New York and Harlem Railroad Company, it was divested of that title when the city took the fee in said avenue between the streets aforesaid on condemnation proceedings in 1850. *Caldwell v. New York & Harlem R. R. Co.*, 164.

**MUNICIPAL CORPORATION** — *Continued.*

13. *Compensation for depreciation in value of abutting property by erection of railroad viaduct on said avenue.* Hence, a property owner on said avenue is entitled to compensation for interference with light and air and depreciation in value of said property caused by the erection of a viaduct by said railroad and its lessee on said avenue, as required of said railroad by the Laws of 1892, chapter 839.

Award of \$6,200 damages sustained. *Id.*

14. *Election Law construed — aldermen of city of New York empowered to designate newspapers to publish notices.* The power of the supervisors of a county to designate newspapers to publish notice of elections and the official canvass of elections under section 22 of the County Law was by section 1586 of the charter of the city of New York (as amended in 1901) transferred to the board of aldermen of said city and not to the board of elections. *Standard Publishing Co. v. City of New York*, 260.

15. *When newspaper can recover for such publication under former designation not revoked.* Hence, when a newspaper which was so designated by the supervisors of Queens county in 1899 has in 1904 published such election notices on the direction of the clerk of said county, and no other newspaper has been designated by the board of aldermen of the city of New York, such newspaper can recover from the city for publishing such notices. *Id.*

16. *Bureau of New York city created by charter.* The only heads of bureaus in the city of New York entitled to immunity from removal "until he has been allowed an opportunity of making an explanation," under the provisions of section 1543 of the charter of Greater New York, are the heads of bureaus specifically created by the charter, or created under power conferred by it. *People ex rel. Michales v. Ahearn*, 741.

17. *Mandamus to compel reinstatement of superintendent of sewers of borough of Manhattan — demurrer to alternative writ sustained.* Hence, when the alternative writ of mandamus whereby the relator, the superintendent of sewers in the bureau of sewers in the office of the president of the borough of Manhattan, seeks reinstatement on the ground that he was dismissed without a hearing, fails to allege that he was at the head of a bureau created by the charter, or by an official given authority by the charter to create bureaus, it is subject to demurrer, as failing to state facts sufficient to show a right to a peremptory writ. *Id.*

18. *Superintendent of sewers not created by charter or under power conferred thereby.* There is no bureau of sewers established by the charter or power given which authorizes the president of the borough of Manhattan to create a bureau of sewers in his department.

Legislation affecting the department of sewers in the city of New York considered. *Id.*

19. *Present incumbent of office not necessary party.* The present incumbent of said office, though a proper party to a writ of mandamus to compel the reinstatement of one removed, is not a necessary party. *Id.*

20. *Municipal authorities of city of New York without power to license permanent encroachments on public streets.* Although the title to the streets in the city of New York is in the municipality it is held in trust for public use, and the board of aldermen and the park commissioners of said city have no power to grant licenses to private landowners to encroach upon the street line by bay windows, etc. *Williams v. Silberman Realty & Construction Co.*, 680.

21. *Sewer assessment according to frontage.* The mere fact that a municipal assessment for a sewer is made at a uniform rate according to the frontage of the premises taxed does not of itself show that the assessment is erroneous, as it may correctly represent the proportionate benefit received. *People ex rel. Keim v. Desmond*, 757.

22. *Certiorari to review assessment for sewer in city of Utica.* On certiorari to review an assessment so made, the relator does not establish its invalidity by showing that his lands, which were elevated above the other side of the street, had previously been served by a short temporary sewer built on his side of the street only, when the assessors' return shows that the new sewer was designed and built as a permanent structure to serve owners on both sides of the street. *Id.*

**MUNICIPAL CORPORATION — Continued.**

23. *Assessment confirmed.* Although the common council has annulled the assessment and sent it back to the assessors for reassessment, who have again made the same assessment, the assessors are the final arbiters as to the extent to which the relator was benefited when the city charter makes their assessment final and conclusive. *Id.*

Negligence — liability of city for injuries received through collapse of bridge over excavation in sidewalk — notice to police officer is notice to city — city joint tortfeasor with landowner making excavation under municipal permit — action against city not barred by prior recovery against contractor erecting bridge. *Parks v. City of New York*, 836.

Treasurer of Delaware county not authorized to pay over to towns taxes received from railroads — failure of said treasurer to show that town received the benefit of such payment — Laws of 1903, chapter 515, unconstitutional as applied to this case.

*Town of Walton v. Adair*, 817.

Negligence — when the board of education of the city of New York is liable for injuries received by a pupil by fall of ceiling in school building — said board liable for negligence — said board liable as master for acts of its subordinates. *Wahrman v. City of New York*, 845.

Certiorari to review dismissal of police officer — dismissal upheld — evidence — when cross-examination as to past record is admissible. *People ex rel. Walters v. Lewis*, 375.

Trespass — injury to property by water from sewer — rule of liability of municipality stated — negligence must be shown. *Ebbets v. City of New York*, 364.

Negligence — when municipality not liable for fall of pedestrian on defective sidewalk — a fall caused by snow. *Rodriguez v. Village of Ossining*, 297.

Board of supervisors — power to offer reward for information of horse thieves — liability therefor. *People ex rel. Collins v. Brown*, 915.

When local bill not unconstitutional in embracing subject not expressed in title.

*City of Elmira v. Seymour*, 199.

Application of civil service rules to officers and employees of.  
*See CIVIL SERVICE.*

Injury to one using a public street.  
*See NEGLIGENCE.*

**MUNICIPAL COURT OF NEW YORK CITY.**

*See COURT.*

**NEGLECT.**

1. *Liability of city for injuries received through collapse of bridge over excavation in sidewalk — notice to police officer is notice to city — city joint tortfeasor with landowner making excavation under municipal permit — action against city not barred by prior recovery against contractor erecting bridge.* The plaintiff's intestate was killed by the collapse of a temporary bridge erected over an excavation in the sidewalk which was made under a permit from the municipal authorities of the city of New York. In an action against said city to recover damages.

*Held*, that notice to the defendant of the defective condition of the bridge was sufficiently established by the uncontradicted testimony of a police officer that the bridge had been shaky for nearly a month prior to its collapse, and that five or six days prior to the accident he had, on the complaint of a third person, reported the condition of the bridge at the police station orally, and eighteen hours before the accident had made a written report of the condition;

That knowledge of such defect by an officer charged with police powers was knowledge by the municipality irrespective of any report thereof by such officer;

That when an inspector appointed by the building department of said city has inspected such bridge the city is chargeable with actual notice that the bridge was defective by reason of the absence of braces.

**NEGLIGENCE — Continued.**

*Held*, further, that a municipality which issues a permit to a landowner to make such excavation in a sidewalk and to erect a temporary bridge thereover, is a joint actor with the owner of the land and is responsible for his default, for a city is bound to see that its streets and sidewalks are kept reasonably safe for public travel;

That an entry of a prior judgment still unsatisfied against the contractors who built the bridge was not an election to hold them alone responsible or an abandonment of the cause of action against the city. A plaintiff may sue joint tortfeasors jointly or separately, but the satisfaction of a judgment against one is a satisfaction against all;

That, although a prior judgment against the contractor and the city jointly had been reversed as to the city, and a new trial granted, the fact that the plaintiff retained his judgment against the contractors did not bar a subsequent action against the city. *Parks v. City of New York*, 836.

2. *Injury while riding on an elevator used to hoist material — when plaintiff not fellow-servant of engineer — burden on plaintiff to show that he was rightfully upon elevator — failure to sustain such burden.* The plaintiff, in the employ of a building contractor, was injured while riding on a hoist elevator installed in the building for hire by the defendant elevating company, for the purpose of hoisting material.

*Held*, that the plaintiff, being in the employ of the contractor, was not the fellow-servant of the engineer who ran the elevator and who was employed by the elevating company;

That, as the elevator was not intended to carry passengers, the presumption was that the plaintiff was riding on it without the consent of the defendant, and that the engineer in permitting him to ride was acting outside the scope of his authority;

That the burden was on the plaintiff to show that he was rightfully upon the elevator with the defendant's permission, express or implied;

That such implied permission was not shown by the fact that the defendant's engineer consented that the plaintiff should ride, unless it were within the scope of his authority, which it was not, he being employed only for the special purpose of running the elevator for carrying material and not for carrying passengers;

That no custom to carry passengers binding on the defendant was shown by mere evidence that men rode on the elevator in this particular instance;

That, as plaintiff had failed to sustain such burden of proof, a dismissal of the complaint was proper. *McDonough v. Pelham Hoist Elevating Co.*, 585.

3. *Employee killed by passing train on elevated track — assumed risk — contributory negligence — evidence — opinions of one not expert, inadmissible.* The plaintiff's intestate, who had been for two months in the defendant's employ in repairing elevated tracks — one month on the particular line in question — while walking on a footway between two tracks, in recoiling from a train passing on one of them was struck and killed by a train passing on the other. The intestate was familiar with the locality. There was a normal clearance of twenty-nine and one-half inches between passing trains, and it was shown that the place was safe for those accustomed to it. There was an outside footpath five feet three inches wide which the intestate could have taken in going to his work, and in that case he would have been entirely out of danger.

Of his own volition he took the center walk knowing that trains were liable to pass, and there was no evidence that he looked to see whether trains were approaching or took any precaution to protect himself when they were passing.

*Held*, that a verdict for the plaintiff should be set aside;

That the risk was apparent and assumed;

That the intestate was guilty of contributory negligence;

That the defendant's foreman superintending the work was not an expert competent to give an opinion as to whether placing red flags at either end of gangs at work on such tracks would make the place a safe place in which to work.

The admission of such opinion is reversible error. *McLaughlin v. Manhattan Railway Co.*, 254.

4. *Death by electricity — defective transformer — evidence sufficient to sustain verdict for plaintiff — when verdict not excessive.* The plaintiff's intestate, a man

**NEGLIGENCE** — *Continued.*

in previous good health, was found dead in the cellar of his house. On his breast and feet were found burns such as might have been caused by an electric current. His clothing was burned in the same places. An incandescent light with defective insulation was found lighted in the cellar. It was shown that the defendant on its primary circuit employed an alternating current of 2,400 volts, which entering a transformer affixed to a pole in front of the decedent's house was there converted into a current of 120 volts, which latter current would have been harmless. There was evidence showing that for some months prior to the decedent's death sparks had been seen about the transformer, and that on the night in question the transformer was surrounded by blue lights and sparks, and that a buzzing noise was heard. It was shown that after the accident the transformer was found to lack half an inch of insulation on one of the primary wires located within nine-sixty-fourths of an inch from the casing thereof, and that a current of 2,400 volts would jump such interval to the secondary circuit.

*Held*, that the defendant's negligence was properly submitted to the jury, and that a verdict that plaintiff's intestate was killed by the breaking down of the transformer which permitted the high tension current to enter the house because of defendant's negligence was supported by the evidence;

That as the deceased was a dentist earning from \$17,000 to \$20,000 yearly, and leaving a family of young children, a verdict of \$40,000 was not excessive. *Morhard v. Richmond Light & R. R. Co.*, 353.

5. *Death of brakeman while coupling defective cars — failure of defendant to promulgate proper rules — recovery by plaintiff sustained — evidence — opinion of expert as to rule properly received — Employers' Liability Act — assumed risk question of fact — extra allowance denied.* The plaintiff, a brakeman in the employ of the defendant, while coupling a defective car in the yard of the defendant by means of "a chain hitch," was injured so severely that he died. Evidence was offered of a method in actual use by other railroads in coupling such defective cars, which was not promulgated as a rule by the defendant, but which would have been a reasonable and practicable rule for conducting the work at which the deceased was engaged.

*Held*, that the jury were warranted in finding the defendant negligent in not providing such rule;

That the fact that the tracks on which the decedent was at work had switches at both ends, while those on which the plaintiff's expert witness had worked did not, rendered both the danger and the need of a strict rule the greater.

When said expert in answer to a question as to whether the rule was practicable for use in a freight yard has answered, "I suppose it would be a practicable rule," it is not error to refuse to strike out such answer, for the witness was testifying to his opinion, which was competent.

That the case was not extraordinary or difficult within the meaning of section 3253 of the Code of Civil Procedure, and that an order granting an extra allowance should be reversed. *Freemont v. Boston & Maine R. R. Co.*, 831.

6. *Injury to eye of fireman by explosion of water gauge — failure to show negligence of defendant.* The plaintiff, a fireman, was struck in the eye by a splinter of glass thrown by the explosion of the water gauge of a switch engine on which he was working. Two items of negligence were charged, *first*, that the engine should have been equipped with a better and safer water-gauge guard, and, *second*, that the gauge had not been properly inspected.

*Held*, that as the proof conclusively showed that the kind of gauge guard used was adopted by practically all the railroad corporations in the country, the defendant was not chargeable with negligence in its use, although there were other styles of guard in use claimed to be safer. A master is not required to use the best appliances known, but only such as are reasonably safe, and in selecting the kind used he may rely on the judgment of others engaged in the same business.

*Held*, further, that, although there was evidence tending to show that a portion of the glass gauge which broke was worn thin, and that there were certain hair lines thereon that an inspection would have disclosed, it was the duty of the engineer — plaintiff's fellow-servant — to make such inspection or to report the defect to the defendant, which, in the absence of notice, was not liable. An official inspector is not required to inspect each minor detail of an engine each time it is used. *Healy v. Buffalo, Rochester & Pittsburgh Railway Co.*, 618.

**NEGLIGENCE — Continued.**

7. *Injury by live wire — failure to protect electric light wire — failure properly to support telephone wire — proximate cause.* The plaintiff, a fireman, while going to a fire found a telephone wire breast high across the path through which the fire engine must pass. In attempting to remove it he was burned and injured by electricity. It was shown that said wire, owned by the defendant telephone company, was not strung on poles, but attached by brackets to wooden buildings with spans of from 519 feet to 168 feet. The use of the wire had been abandoned for some time. Because of a fire in one of the wooden buildings to which it was attached the wire had fallen on an unprotected electric light wire operated by the codefendant, and carrying a current of 2,500 volts. Said electric light wire was uninsulated, and not protected by guard wires. The telephone wire was strung 8 feet above said electric light wire. There was evidence that insulation or a guard wire over the light wire, if kept in good condition, would have prevented the transmission of the current to the telephone wire.

*Held*, that the negligence of both defendants was properly left to the jury and that a verdict for the plaintiff was warranted by the evidence;

That the question as to whether the defendants in the exercise of reasonable prudence could have anticipated that said building might burn and bring the wires into contact was for the jury;

That the failure of the defendants properly to protect the wires was the proximate cause of the injury, and not the burning of the building which caused the fall of the wire. *Horning v. Hudson River Telephone Co.*, 122.

8. *Death by explosion of dynamite — failure to show negligence of defendant — erroneous charge.* The plaintiff's intestate, an employee of the defendant, was last seen alive going to a small house maintained by the defendant for the purpose of thawing out dynamite to be used in blasting. It was shown that the custom of thawing dynamite was usual and necessary, and that after it was thawed out in order to use it a small hole was cut in one end of the stick of dynamite and an explosive cap inserted which was secured to the stick by winding wires around it. The only negligence sought to be proved was that, if dynamite were inclosed in a metal case and heated, with no means of allowing the resulting gases to escape, an explosion was likely. It was not shown, however, that the defendant so inclosed the dynamite, but that it merely inserted an explosive cap in one end, which could not confine the gases.

*Held*, that a charge which in effect authorized the jury to find out the cause of the explosion, which cause the plaintiff had not discovered and proved to the jury, was error;

That, as it was not shown that the defendant had confined the dynamite when heating it so as to confine the gases, the evidence that it "would" explode if heated when so confined furnished no grounds on which the jury could impute negligence to the defendant. *Hall v. Cayuga Lake Cement Co.*, 801.

9. *Complaint — when allegations of injury sufficient to allow proof of impaired eyesight and varicose veins.* Under a complaint which alleges that the plaintiff "sustained a compound fracture of his skull," from which bone was removed, which left his brain in an exposed condition, etc., and "That the said break in the plaintiff's skull is a permanent and incurable injury, and is and will be the cause of plaintiff's being, becoming and remaining afflicted with diseases. That by reason of his said injuries \* \* \* his physical and mental abilities have been and will remain impaired, lessened and destroyed," the plaintiff may show that impairment of eyesight and varicose veins resulted from the injury, although such injuries are not specifically alleged. Under a general allegation of bodily injuries the plaintiff may prove any injury to his person, and if the defendant desires that they should be more definitely stated he should either move to have them made more specific or for a bill of particulars. But if the complaint specifies the injuries received, proof cannot be given of any other injuries unless they necessarily and immediately flow from those named. *Rudomin v. Interurban Street Railway Co.*, 548.

10. *When objection to exclusion of evidence of injuries sufficient.* The error in excluding such evidence of specific injury is available on appeal when the court held that the proof was inadmissible on the opening of the case and so instructed the jury, to which exception was taken.

The error is also available under an exception to the exclusion of evidence of experts offered to show such injury. *Id.*

**NEGLIGENCE** — *Continued.*

11. *Injury by set screw in revolving shaft—unsafe place to work—evidence of prior accident—extra allowance improper.* The plaintiff, sent to repair an elevator, in stepping over a revolving shaft was caught by a set screw projecting one and a quarter inches from the shaft and was injured. The set screw was not covered and the plaintiff had not been warned thereof. The place was dark and plaintiff was working with a hand lantern. He gave evidence of due care. It was shown that other employees were required to go to said place to make repairs, and that one of them had previously been caught by the same set screw, of which fact the defendant had notice.

*Held*, that the question as to whether the defendant had provided a safe place to work was for the jury;

That a verdict for the plaintiff was warranted by the evidence;

That, under the circumstances, the risk was not obvious;

That proof of said prior accident from same cause was proper;

That an extra allowance was improper. *Walker v. Newton Falls Paper Co.*, 19.

12. *Injury to hand by roller of paper mill—when risk not obvious or assumed—failure to give instructions.* The plaintiff, an infant of sixteen years, had his hand crushed between revolving rollers on a paper machine, while engaged as a "backtender." He had to work in a space of two and one-half feet between two sets of revolving rollers, and if the paper broke in passing from one set of rollers to another, it was his duty to cut off the paper accumulating and insert the sheet between the other set of rollers. This had to be done while the machinery was in motion and required quick and accurate work. It was shown that there was a tendency in the rollers to draw in the waste paper between them and that the defendant did not know of and had not been warned of this danger.

*Held*, that the negligence of the defendant was for the jury and that a verdict for the plaintiff was warranted by the evidence; that as matter of law the risk was not obvious and assumed by the plaintiff. *Makin v. Pettebone Cataract Paper Co.*, 726.

13. *Injury to plaintiff by collision with trolley car while driving across tracks—contributory negligence.* The plaintiff was injured by a collision with a trolley car running at forty-five miles per hour while attempting to drive across the tracks. The highway crossed the tracks in a diagonal direction and the plaintiff was required to look over his right shoulder to see cars coming from behind. He testified that while his horses were on the north track he looked and saw a car coming from behind 200 feet away on the south track. His horses were going slowly. He testified that he thought he could get across.

*Held*, that the plaintiff was guilty of contributory negligence, for, being in a safe place when he first saw the car approaching, it was his duty to have stopped. *Fancher v. Fonda, Johnstown & Gloversville R. R. Co.*, 4.

14. *Death of engine driver by collision with derrick of wrecking train—failure of wrecking crew to give warning—negligence of fellow-servant.* The plaintiff's intestate, while driving the defendant's engine, was struck and killed by the arm of a derrick engaged in removing wreckage from an adjoining track, which arm extended over the track upon which the intestate was driving, which was in other respects unobstructed and safe. The negligence charged was the failure of the crew of the wrecking train to flag the engine which plaintiff's intestate was driving.

*Held*, that assuming said negligence, it was that of the intestate's fellow-servants, for which the defendant was not liable;

That the fact that the flagman was employed on the wrecking train did not make him the master's alter ego. *McAuley v. New York Central & H. R. R. Co.*, 117.

15. *Master and servant—failure of plaintiff to show employment—evidence.* In an action by a workman to recover for injuries received by him in the fall of a scaffold, he has not met the burden cast upon him to show his employment by defendant, by simply showing that the defendant was about the building, giving directions, and that he handed to some of the men the amounts due them for wages, and, after the accident, paid to plaintiff the amount due him, when it appears that the defendant was the president of a corporation, dealing in real estate, engaged in the construction of the building, and that the contracts for the erection of the building where plaintiff was injured were let to independent

**NEGLIGENCE — Continued.**

contractors, one of whom testified that he employed plaintiff. *Davis v. Martin*, 411.

16. *Burden of proof.* The burden of proof is on plaintiff to establish his employment, and he cannot recover on the weakness of defendant's testimony. *Id.*

17. *Passenger thrown from surface car by sudden jolt and rendered unconscious — when negligence question for jury.* In an action to recover damages for injuries sustained through the negligent operation of a surface car, whereby the plaintiff was thrown from the car, the negligence of the defendant is for the jury when the plaintiff has testified that, while standing up and signaling for the car to stop, she felt a sudden severe shock or jolt which threw her, and that thereafter she remembered nothing, being rendered unconscious. On such testimony a nonsuit is error.

The fact that the plaintiff could not state what happened after the shock, by reason of being unconscious, does not prevent a recovery. *Lomas v. New York City Railway Co.*, 332.

18. *When the board of education of the city of New York is liable for negligence — said board liable as master for acts of its subordinates.* As the charter of the city of Greater New York makes the board of education of said city a separate corporation, and vests said board with the title to real estate used for school purposes, with power to alter, repair and inspect said school buildings through subordinates appointed and controlled by it, said board is charged with the duty of repairing said buildings and keeping them in a safe condition, and is liable for its negligence in failing to do so. Said board also occupies the relation of master and servant with its subordinates appointed by it and under its control and direction. *Wahrman v. City of New York*, 345.

19. *When the board of education of the city of New York is liable for injuries received by a pupil by a fall of ceiling in school building.* Hence, when a pupil has been injured by the fall of a ceiling in a school building in said city, and it is shown that an inspector of the defendant had for some years noted the defective condition of the building, the sagging of the ceilings, etc., and had reported the defects several times to said board, the board is liable for the injuries received by said pupil, if the plaintiff on his part was free from negligence contributing to the injury. *Id.*

20. *When municipality not liable for fall of pedestrian on defective sidewalk — a fall caused by snow.* The plaintiff, while walking on a flagstone two and a half feet in length, with a slope of two and a half inches, joining two sections of sidewalk having different levels, slipped on such incline, owing to snow thereon, and her foot catching on the flagstone at the foot of the slope, which was raised one-half of an inch above said sloping stone, fell and was injured.

*Held*, that the injury was caused by the slipping of the plaintiff on the snow and not by the slope, or by the lower stone projecting above the same, hence the municipality was not liable. *Rodriguez v. Village of Ossining*, 297.

21. *Injury to plaintiff by fall through unguarded elevator shaft on demised premises — failure to show negligence of lessor.* The plaintiff fell down an unguarded elevator shaft of a building and was injured. At the time the building was in the possession of a tenant and sub-tenant. In an action against the lessor for damages, no proof was given that at the time the lease was made the defect in the elevator shaft existed.

*Held*, that a nonsuit should have been granted, as the defendant did not maintain the elevator and there was no evidence to show a faulty condition of the premises at the time of the lease thereof. *Washington v. Episcopal Church of St. Peter's*, 402.

22. *Injury by fall of scaffold — Employers' Liability Act — liability of master for servant exercising superintendence.* When the evidence shows that the scaffold which fell and injured the plaintiff was originally constructed by the plaintiff and his fellow-servants in a safe manner, but became unsafe by reason of the removal of a supporting pier under the direction of a person in the service of the defendant, exercising superintendence within the meaning of the Employers' Liability Act, a recovery by the plaintiff is not barred on the theory that the negligence is that of a fellow-servant. *Berthelson v. Gabler*, 142.



**NEGLIGENCE—Continued.**

23. *Continuing duty to keep structure safe.* Though the scaffold was originally safe, it was still the duty of the defendant to maintain it in such condition. *Id.*

24. *Freedom from contributory negligence.* The plaintiff is not guilty of negligence as a matter of law, although he heard an order given to take down the supporting pier, as he is entitled to assume that defendant will discharge his continuing duty to keep the scaffold safe, unless the omission to do so were obvious and actually known to the plaintiff. *Id.*

25. *Injury by bundle of newspapers thrown from moving train—evidence—error in excluding evidence of custom of railroad to permit throwing of papers.* In an action to recover damages for injuries received by plaintiff, who was struck by a heavy bundle of newspapers thrown from the defendant's train running at a high rate of speed, it is error to exclude evidence offered by the plaintiff of a custom of the defendant to allow news agents to throw such bundles of papers from its moving trains, as a railroad company permitting it is liable for the injuries caused thereby. *Clifford v. New York Central & H. R. R. Co.*, 809.

26. *Injury by fellow-servant—evidence insufficient to show negligence of master in employing said servant.* Evidence that the plaintiff's fellow-servant, who in driving a bung into a barrel accidentally struck the plaintiff, had previously, through carelessness, rolled a barrel down an elevator shaft, had rolled a keg downstairs, broken bottles, bruised his fingers, etc., without proof that these facts were known to the master, is insufficient to fasten negligence upon the master for employing an incompetent servant. *Andrews v. Reiners*, 435.

27. *Passenger thrown from car while riding on platform—failure to show negligence of defendant.* While it is not contributory negligence *per se* for a passenger to ride on the platform of a crowded surface car, he assumes the ordinary risks incident to such a position. A passenger who is thrown from such position must show, in order to charge the railway company with negligence, that he was thrown by reason of some unusual movement caused by the negligent operation of the car. *Kiefer v. Brooklyn Heights R. R. Co.*, 404.

28. *Evidence of negligence.* Hence, mere testimony that the car while rounding a curve was going "pretty swift \* \* \* about nine miles per hour" is insufficient to make a case, particularly when other persons in the same situation observed nothing unusual. *Id.*

29. *Contributory negligence.* A passenger in such position, who does nothing to protect himself, or even look to see if there is anything from which he may obtain support, is guilty of contributory negligence. *Id.*

30. *Evidence of eruptions resulting from injuries to abdomen, when admissible under allegations of complaint.* In an action to recover for injuries received by negligence, when the complaint alleges that the plaintiff was struck in the abdomen and injured and bruised there and internally, it is not error to admit proof that eruptions appeared on the abdomen when the same are shown to have been a development of the injury alleged. *Hynds v. Brooklyn Heights R. R. Co.*, 339.

31. *Membership corporation liable for personal injuries received through negligence of its servants.* A membership corporation organized as an athletic club, sustained by membership dues and maintaining a clubhouse, is liable for injuries resulting in the death of a member received by the negligent act of the driver of a wagon used by said club for conveying members to the clubhouse. *Beecroft v. New York Athletic Club*, 392.

32. *Evidence—statement of member of such corporation to accident insurance company that he was being carried home not conclusive.* The fact that the decedent, after the injury, in complying with the conditions of certain accident insurance policies, stated that his injuries were received while being carried to his home, does not prevent a recovery against said club when there is evidence that in fact he was being driven to the club in the club conveyance in order to keep an engagement with a friend. *Id.*

33. *Verdict not excessive.* A verdict of \$1,500 for injuries received in a collision, by which plaintiff's arm was broken in three places and which caused internal congestion, etc., is not excessive, and an order requiring the plaintiff to stipulate to reduce such verdict to \$500 will be reversed. *McGahie v. Sproat*, 445.

**NEGLIGENCE** — *Continued.*

34. *Infant in arms killed by train while being carried across tracks — no recovery when attendant of infant guilty of contributory negligence.* There can be no recovery for the death of an infant, nineteen months of age, who while being carried across railroad tracks was struck and killed, when the negligence of the person carrying such infant contributed to the accident. *Paige v. New York Central & H. R. R. Co.*, 828.

35. *Facts showing such contributory negligence.* When it is shown that the person carrying such infant on approaching the crossing looked east and west and saw a train coming from the west on the nearest track, and having crossed that track was struck by another train coming from the east on the next track, down which there was an unobstructed view for 2,400 feet, such person is guilty of contributory negligence as a matter of law, and a recovery for the death of said infant will be reversed. *Id.*

Evidence — when written statement of defendant's witness inadmissible — counsel not entitled to read such statement to witness — power of trial judge — negligence — injury while alighting from train.

*Finan v. New York Central & Hudson River R. R. Co.*, 333.

Municipal corporation — city of New York liable for injuries received by reason of accumulation of ice in front of premises of board of education.

*Pymm v. City of New York*, 330.

Death of employee by falling down elevator shaft — elevator moved from position in which it was left by intestate — insufficient light — contributory negligence.

*Cholet v. City of Syracuse*, 903.

Trespass — injury to property by water from sewer — rule of liability of municipality stated — negligence must be shown.

*Ebbets v. City of New York*, 364.

**NEGOTIABLE PAPER.**

Law relating to.

*See* **BILLS AND NOTES.**

**NEW TRIAL.**

Suit in equity — new trial ordered when trial justice designated to Appellate Division before signing and filing decision — cause cannot await expiration of such designation — court cannot compel submission of case on former testimony.

*Williamson v. Randolph*, 539.

Divorce — when correspondent appearing in action not entitled to retrial of issues — Code of Civil Procedure, section 1757, construed.

*Boller v. Boller*, 240.

**NEW YORK.**

Municipal Court of.

*See* **COURT.**

**NEW YORK CITY.**

*See* **MUNICIPAL CORPORATION.**

**NEW YORK STATE CONSTITUTION.**

*See* **CONSTITUTIONAL LAW.**

[See table of the provisions of the Constitution cited, *ante*, in this volume.]

**NIAGARA RIVER.**

Ownership of waters thereof.

*See* **RIPARIAN RIGHTS.**

**NOLLE PROSEQUI.**

Criminal law — when withdrawal of counts in an indictment does not invalidate conviction under remaining counts — *nolle prosequi* abolished.

*People v. Lewis*, 558.

**NON-RESIDENT.**

Exemption of, from taxation.

*See* **TAX.**

**NONSUIT.***See* TRIAL.**NORTH HEMPSTEAD.***See* MUNICIPAL CORPORATION.**NUISANCE.**

*Damages to lessee of adjoining property by operation of electric light plant.* A lessee is entitled to damages for the depreciation in the "usable value" of the premises caused by the operation of an adjoining electric light plant which constitutes a nuisance.

When it is shown that such plant discharged smoke, steam, cinders and noisome vapors upon plaintiff's premises, made loud and incessant noise, caused jar and vibration, necessitated constant cleaning of plaintiff's premises, and that between the time the power house was built and the plaintiff left the premises, a period of five years, the number of boarders in the plaintiff's house decreased from twenty-five to fifteen with a corresponding decrease in receipts, etc., a verdict of \$4,000 is warranted by the evidence. *Bly v. Edison Electric Illuminating Co.*, 170.

Trespass—injury to property by water from sewer—rule of liability of municipality stated—negligence must be shown.

*Ebbets v. City of New York*, 364.**OBJECTION.**

To the reception of evidence.

*See* EVIDENCE.**OFFICER.**

False imprisonment—evidence—error in excluding rules of institution which permitted imprisonment of plaintiff—evidence that defendants reported their act to the head of institution—error in excluding instructions given to defendants—delegation of power to confine inmates of institution.

*Cunningham v. Shea*, 624.

Municipal corporations—not liable for salary of *de jure* officer while place filled by another—unnecessary for defendant to show which particular *de facto* appointee filled plaintiff's place after his dismissal.

*Grant v. City of New York*, 160.

Life insurance corporation—when sale of assets to other corporation valid—when Superintendent of Insurance not personally liable for allowing substitution of bonds deposited in his department.

*Raymond v. Security Trust & Life Insurance Co.*, 191.

Highway Law—highway commissioners may waive notice of application to lay out road—when public officers may waive statutory provisions.

*Matter of Wood*, 781.

Application of civil service rules to.

*See* CIVIL SERVICE.

Of a corporation.

*See* CORPORATION.

Of municipal corporation.

*See* MUNICIPAL CORPORATION.*See* CERTIORARI.**PARENT AND CHILD.**

*Habeas corpus to determine custody of child pending action for divorce.* When on habeas corpus to determine the custody of children pending an action for divorce it is shown that the children are boys not of such tender years that the mother is essential to their daily living; that the mother is indiscreet, intemperate of speech and infirm of temper, and associates with men whose influence is bad, etc., while the father offers to such children a home in refined surroundings, their custody should be awarded to the father.

It is not ability to provide physical comforts and care only that weighs in deciding such issue, but the moral surroundings of the children are to be considered. *People ex rel. Lawson v. Lawson*, 473.

**PARENT AND CHILD—Continued.**

Trust deed with remainders to heirs of beneficiary — when heirs to be ascertained at death of beneficiary — adoption — when adopted child is heir and takes trust estate to exclusion of brothers of beneficiary.

*Gilliam v. Guaranty Trust Co.*, 656.

Deed — action to set aside conveyance and assignment made by devisee — fraudulent representations by grantee — evidence sufficient to establish legitimacy and title of grantor.

*Cramsey v. Sterling*, 568.

**PARTITION.**

*When direction for sale of premises proper although there are contingent interests.* Although there are contingent interests in real estate devised by will dependent upon whether children entitled to share may come into being, an order of sale in an action for partition is proper, when all the persons who have a present interest in the subject-matter of the sale are before the court, including the executor of the will who will receive the portions of such afterborn children in trust to be disposed of under the terms of the will. *Dwight v. Lawrence*, 616.

**PARTNERSHIP.**

1. *Capital contributed by partner to be returned on dissolution before division of profits—evidence insufficient to show that property contributed by one partner became firm property.* When, in an action to establish a partnership and for an accounting, the plaintiff's evidence as to the terms of the alleged partnership is in substance that the defendant was to put in horses and wagons then owned by him against the plaintiff's experience in the trucking business, and that the parties were to divide the profits, and when it is also shown that the defendant individually purchased and paid for all additions to the partnership property, a decree allowing the plaintiff to share in the property and assets of the business is unwarranted.

The title to property put in as capital against the labor of another remains in the partner contributing it. The profits only are to be shared by the parties. The same is true of additional property not purchased with the money or profits of the partnership, but purchased by one partner with his own funds. *Hillock v. Grape*, 720.

2. *When new partnership cannot recover on unperformed contract of sale made by former partnership.* When a partnership has contracted to sell and deliver a certain quantity of coal at a stated price, and when at a time when said contract is partly performed the partnership is dissolved by the retirement of one partner and a new partnership is formed, which new partnership, after a few deliveries, refused to complete said deliveries as agreed in the original contract, there can be no recovery from the vendee by the new partnership on the original unperformed contract of the old firm. *Piper v. Seager*, 118.

8. *Amendment of pleading—when error to refuse to allow vendee to amend answer to allege breach of contract.* In such action it is error to refuse to allow the vendee to amend his answer so as to set up the breach of said contract. *Id.*

4. *To speculate in lands—injunction—when carrying out of contract of sale made by one partner will not be enjoined.* When a contract to speculate in lands constitutes a partnership, and one party thereto holding title in his own name has entered into an executory contract to sell partnership lands at their fair market value, a temporary injunction restraining such sale will be refused in an action by the other partner brought to obtain a permanent injunction prohibiting such sale. *Babcock v. Leonard*, 294.

**PARTY.**

1. *Objection to defect of parties defendant must be taken by demurrer or answer—proper practice stated.* When a defect of parties appears upon the face of the complaint the defendant may demur thereto, and if the defect does not appear upon the face of the complaint, the objection may be taken by answer. A failure to take such objection by demurrer or answer is a waiver of the defect. (Code Civ. Proc. §§ 488, 498, 499.) But even though the objection be so waived the court on its own motion may direct parties to be brought in if a complete determination of the controversy cannot be had without their presence. (Code Civ. Proc. § 452.) *Knickerbocker Trust Co. v. Ontario, C. & R. S. R. Co.*, 812.

**PARTY — Continued.**

2. *Objection cannot be made by motion.* But an objection to defect of parties must be made by demurrer or answer and cannot be made by motion. *Id.*

3. *Under complaint against joint defendants judgment may be had against one only — Code of Civil Procedure, section 1205, construed.* Although a complaint sets out an action to recover for work, labor and services against joint defendants, a judgment against one of said defendants only is authorized by section 1205 of the Code of Civil Procedure. Said section is as broad as section 274 of the former Code of Procedure and requires the same construction.

The common-law rule no longer obtains. *Latton v. Partridge*, 8.

Negligence — liability of city for injuries received through collapse of bridge over excavation in sidewalk — notice to police officer is notice to city — city joint tortfeasor with landowner making excavation under municipal permit — action against city not barred by prior recovery against contractor erecting bridge.

*Parks v. City of New York*, 836.

Mortgage — assignor of mortgage who guarantees payment proper party on foreclosure — no action against such assignor for deficiency without leave of court — complaint not showing leave of court fails to state cause of action.

*Robert v. Kidansky*, 475.

Municipal corporation — mandamus to compel reinstatement of superintendent of sewers of borough of Manhattan — said office not created by charter or under power conferred thereby — demurrer to alternative writ sustained — present incumbent of office not necessary party.

*People ex rel. Michales v. Ahearn*, 741.

Former judgment for tort unsatisfied does not bar subsequent action against joint tortfeasor — subsequent action barred only when prior judgment satisfied — reply not necessary to defense of former recovery.

*Reno v. Thompson*, 316.

Corporation — action by stockholder to dissolve corporation and set aside prior voluntary dissolution — when directors not necessary parties defendant.

*Knickerbocker v. Groton Bridge & Manufacturing Co.*, 145.

Divorce — when correspondent appearing in action not entitled to retrial of issues.

*Boller v. Boller*, 240.

**PEDIGREE.**

Evidence — pedigree may be proved by hearsay — rules as to the admission of oral and written declarations on questions of pedigree stated.

*Layton v. Kraft*, 842.

**PENAL CODE.**

§ 529 — Crime — payment for goods with worthless check — evidence insufficient to sustain conviction for violation of section 529 of the Penal Code — erroneous refusal to charge — jurisdiction, question cannot be raised on conflicting evidence.

*People v. Lipp*, 504.

§ 675 — Crime — playing "craps" in vacant lot without breach of the peace is not criminal.

*People v. McDermott*, 380.

**PENALTY.**

Street surface railways — ownership by one corporation of majority of stock of another corporation not a control thereof under section 101 of the Railroad Law — penalty under section 39 of the Railroad Law — when action for such penalty does not lie against corporation owning majority of stock of other corporation.

*Senior v. New York City Railway Co.*, 39.

**PERSONAL PROPERTY.**

Conversion of stock — when transferee of messenger sent for stock liable for conversion — when messenger not clothed with indicia of title.

*Hall v. Wagner*, 70.

Mortgage — evidence insufficient to show that a painting was covered by mortgage on hotel property.

*Hoffman House v. Barkley (No. 2)*, 564.

**PERSONAL PROPERTY — Continued.**

Chattel mortgage — when not paid by delivery of defective real mortgage in lieu thereof.

*Shaw v. Cooke*, 202.

Sale of.

*See SALE.*

Tax on.

*See TAX.*

Bequest of.

*See WILL.*

**PHYSICIANS.**

Evidence — privilege of communications to physician not waived by taking deposition of such physician — privilege of physician can only be waived in open court or by stipulation.

*Clifford v. Denver & Rio Grande Railroad Co.*, 513.

**PLEADING.**

1. *Complaint — action against syndicate on guaranty to sell securities — when damage sufficiently alleged — complaint on breach of contract not demurrable for failure to allege damage — contract construed.* The complaint set out a contract with the defendant, a selling syndicate organized to sell stock of the United States Shipbuilding Company, whereby the syndicate agreed in substance to sell securities owned by the plaintiff within one year, at a price not less than that specified therein, and undertook that the plaintiff should receive at the end of the year the price stipulated; that the defendant requested the plaintiff to hold the securities in his possession, but at the defendant's use and disposal, which the plaintiff did, and repeatedly tendered the same to the defendant, etc. The complaint further alleged, by way of damage, that "the defendant failed to make any sales of the securities aforementioned as plaintiff has been informed and believes. Certainly the defendant failed to account to the plaintiff as provided in the agreement." Meanwhile the securities had become substantially valueless "to plaintiff's damage in the sum of," etc.

On demurrer to the said complaint as failing to show damage,

*Held*, that the damage sustained by the plaintiff was the difference between the value of the securities at the end of the year, when the defendant agreed to pay, and the minimum price at which the defendant agreed that they should be sold;

That the plaintiff's damage was sufficiently alleged;

That as the plaintiff was in any event entitled to nominal damages for the breach of contract the complaint was not demurrable, though no damage were alleged;

That, though the contract set forth contained a provision that the same was to become null and void on a date named (the date for which payment to plaintiff was set), the liability of the defendant was not affected by said clause, as to hold otherwise would be to nullify the whole agreement between the parties. *Gause v. Commonwealth Trust Co.*, 530.

2. *Allegations of conspiracy in action in equity — allegations setting out evidence stricken out.* Though in an action in equity for an accounting for moneys obtained by the defendants through a conspiracy of extraordinary character the rules of pleading governing an action at law should be relaxed and allegations which bear upon the fraudulent scheme of the conspirators are proper, allegations which merely set out evidence of such conspiracy are improper and should be stricken out.

Specific allegations considered and stricken out. *Bankers' Surety Co. v. Rothschild*, 130.

Practice — action on life insurance policy — error to dismiss complaint because answer sets out short Statute of Limitations — prior action in County Court discontinued because of lack of jurisdiction — when such discontinuance voluntary under section 405 of the Code of Civil Procedure — when running of Statute of Limitations stopped during such prior action.

*Bannister v. Michigan Mutual Life Insurance Co.*, 765.

Contract — contract of transferrer of stock that corporate debts will be collected — such contract not for benefit of corporation — when no action by corpo-

**PLEADING — Continued.**

ration lies thereon — proof of assignment of rights of purchaser not admissible unless alleged in complaint.

*Rochester Dry Goods Co. v. Fahy*, 748.

Corporation — action by stockholder to dissolve corporation and set aside prior voluntary dissolution — complaint — failure to state cause of action — when directors not necessary parties defendant.

*Knickerbocker v. Groton Bridge & Manufacturing Co.*, 145.

Real property — action for specific performance of contract to purchase — when vendor's title obtained through foreclosure is marketable though service by publication was irregular — when irregularity in such service not vital — order of publication amended *nunc pro tunc*.

*Mishkind-Feinberg Realty Co. v. Sidorsky*, 578.

Injunction *pendente lite* — when assignee of lease entitled to injunction to restrain landlord from interfering with his possession — complaint insufficient which fails to allege facts showing remedy at law is inadequate — affidavits insufficient.

*Goldman v. Corn*, 674.

Libel — complaint — general allegation that libel referred to plaintiff — Code Civil Procedure, section 535, construed — when complaint containing general allegation will be sustained on demurrer.

*Nunnally v. Tribune Association*, 485.

Real property — injury to shade trees by erection of telephone poles — damage recoverable when injury is wanton — when complaint dismissed for failure to show damage.

*Osborne v. Auburn Telephone Co.*, 702.

Former judgment for tort unsatisfied does not bar subsequent action against joint tortfeasor — subsequent action barred only when prior judgment satisfied — reply not necessary to defense of former recovery.

*Reno v. Thompson*, 816.

Common carrier — no recovery on common-law liability of carrier under complaint setting out breach of express contract — recovery for tort not proper under complaint on contract — failure to show conversion.

*Rosenfeld v. Central Vermont R. Co.*, 871.

Mortgage — assignor of mortgage who guarantees payment proper party on foreclosure — no action against such assignor for deficiency without leave of court — complaint not showing leave of court fails to state cause of action.

*Robert v. Kidansky*, 475.

Negligence — complaint — when allegations of injury sufficient to allow proof of impaired eyesight and varicose veins — when objection to exclusion of evidence of injuries sufficient.

*Rudomin v. Interurban Street Railway Co.*, 548.

Injunction to restrain sale of collateral security — when remedy at law adequate — complaint — failure to show irreparable damage and that remedy at law is inadequate.

*Ehrich v. Grant*, 196.

Parties — objection to defect of parties defendant must be taken by demurrer or answer — proper practice stated — objection cannot be made by motion.

*Knickerbocker Trust Co. v. Oneonta, C. & R. S. R. Co.*, 812.

*Lis pendens* — right thereto determined by complaint — when cancellation of *lis pendens* refused — merits of action not determined on motion to cancel *lis pendens*.

*Lindheim & Co. v. Central Nat. Realty & Construction Co.*, 275.

Stockholder's action to recover corporate assets dissipated by fraud — when prior demand that corporation bring action not necessary — proper parties defendant.

*Weber v. Wallerstein (No. 1)*, 698.

Slander — words charging one with exacting commissions — complaint — meaning of words dependent on extrinsic facts must be alleged.

*Russell v. Barron*, 383.

**PLEADING** — *Continued.*

Sale — conversion — secured debt sold as worthless by assignee for benefit of creditors — counterclaim asking rescission requires reply.

*Flynn v. Smith*, 870.

Amendment of pleading — when error to refuse to allow vendee to amend answer to allege breach of contract.

*Piper v. Seager*, 113.

Libel — publication wholly facetious cannot be made libelous by innuendo — demurrer to complaint.

*Lamberti v. Sun Printing & Publishing Assn.*, 437.

Municipal corporation — mandamus to compel reinstatement of superintendent of sewers of borough of Manhattan — demurrer to alternative writ sustained.

*People ex rel. Michales v. Ahearn*, 741.

Negligence — evidence of eruptions resulting from injuries to abdomen, when admissible under allegations of complaint.

*Hynds v. Brooklyn Heights R. R. Co.*, 339.

Libel — article insinuating lewd motives to scientist — complaint based on such article, when not demurrable.

*MacDonald v. Sun Printing & Publishing Assn. (No. 3)*, 467.

When complaint for specific performance not amendable to allow recovery on *quantum meruit*.

*Flanders v. Rosoff*, 1.

Taxation of costs — costs before notice of trial in action for money had and received — when complaint states such cause of action.

*Lange v. Schile*, 613.

Landlord and tenant — action for use and occupation after notice to vacate — when recovery limited to rental stated in lease.

*Stevens v. City of New York*, 362.

Ejectment — when such action triable before jury although incidental equitable relief is demanded.

*Remsen v. New York, Brooklyn & M. Beach R. Co.*, 413.

Libel — when complaint with allegation that libel referred to plaintiff is not demurrable.

*Nunnally v. New-Yorker Staats-Zeitung*, 432.

Receivers — when not appointed in action to recover corporate assets.

*Weber v. Wallerstein (No. 2)*, 700.

Specific performance — adequate remedy at law not pleaded.

*Urbansky v. Shirmer*, 50.

Libel — publication calling scientist a "humbug" and "pseudo-scientist."

*MacDonald v. Sun Printing & Publishing Assn. (No. 2)*, 465.

Sale — counterclaim asking rescission requires reply.

*Flynn v. Smith*, 870.

Conversion — when complaint states cause of action for conversion.

*Sinclair v. Higgins*, 206.

*See PRACTICE.*

**POLICY.**

Of insurance.

*See INSURANCE.*

**POWER.**

Will — power coupled with interest — conveyance by warranty deed for full value shows intention to exercise power — husband not necessary party to wife's deed.

*Vines v. Clarke*, 12.

Will — discretionary power of disposal by widow — when widow may exercise such power by a devise charged with advancements to other heirs.

*Monjo v. Woodhouse*, 80.



**POWER** — *Continued.*

Tax Law — inheritance tax on property of non-resident — when trust funds passing under power of appointment taxable — when legacy not taxable.

*Matter of Lord, 152.*

Tax Law — inheritance tax — when situs of property immaterial — property passing under power of appointment exercised by resident is taxable.

*Matter of Hull, 322.*

**PRACTICE.**

1. *Action on life insurance policy — error to dismiss complaint because answer sets out short Statute of Limitations — prior action in County Court discontinued because of lack of jurisdiction — when such discontinuance voluntary under section 405 of the Code of Civil Procedure — when running of Statute of Limitations stopped during such prior action.* It is error to dismiss the complaint in an action to recover on a policy of life insurance because the answer sets out a one-year Statute of Limitations as to which the complaint is silent, although more than one year has elapsed since the death of the insured. Matters of fact alleged in an answer are not to be regarded as admitted by the complaint for the purpose of a motion to dismiss such complaint. Proof of such allegations must be given.

The plaintiff had begun a prior action on the policy in the County Court and discontinued the same on the defendant's appearing specially to object to the jurisdiction on the ground that it was a foreign corporation. The objection was made five months after the death of the insured, but the plaintiff did not discontinue and bring her new action until more than one year after said death. As to whether or not the discontinuance was voluntary and as to the operation of the short statute under section 405 of the Code of Civil Procedure,

*Held* (SPRING and NASH, JJ.), that the purpose of said section is to prevent the running of the Statute of Limitations while an action is pending, and as the defendant had appeared specially and not on the merits, the discontinuance was forced and not voluntary. Hence, the time the action was pending should be deducted from the period, although the second action was not brought within one year from the death of the insured.

(KRUSE, J.): As the record is silent as to the grounds of the discontinuance in the County Court, it is not disclosed that the action was not terminated by voluntary discontinuance.

(WILLIAMS, J., and McLENNAN, P. J.): As the defendant's objection in the County Court was made five months after the death of the insured, and the plaintiff had allowed a year from the time of death to pass without discontinuing, she could not claim the protection of section 405 of the Code of Civil Procedure. *Bunnister v. Michigan Mutual Life Insurance Co., 765.*

2. *Lis pendens — right thereto determined by complaint.* Though a real estate broker who has rendered services in effecting an exchange of lands is not entitled to a lien thereon, yet when the complaint of such broker, suing his principal and the grantee of the principal for commissions, sets out that the premises by express agreement were to be subject to the rights of the plaintiff, and that certain conveyances of the property were without consideration and void as against the plaintiff, and in pursuance of a scheme to defraud him, etc., and the relief asked is that the plaintiff be declared to have a lien, and that the unconveyed property be sold, etc., such complaint, good or bad on the merits, sets out an action to recover a judgment affecting the title to real property. *Lindheim & Co. v. Central Nat. Realty & Construction Co., 275.*

3. *When cancellation of lis pendens refused.* Hence, the right to a *lis pendens* is absolute, and the same cannot be canceled except pursuant to section 1674 of the Code of Civil Procedure. *Id.*

4. *Merits of action not determined on motion to cancel lis pendens.* If the complaint sets out such cause of action the merits thereof cannot be determined on a motion to cancel a *lis pendens*. *Id.*

5. *Lis pendens — Code of Civil Procedure, section 1671, construed — specific performance.* Although the amendment to section 1671 of the Code of Civil Procedure, made by Laws of 1905, chapter 60, allows the cancellation of the *lis pendens* when "adequate relief can be secured to the plaintiff by a deposit of money or \* \* \* an undertaking," such *lis pendens* should not be canceled when it appears from the complaint or by established facts that the plaintiff

**PRACTICE — Continued.**

may be entitled to the specific performance of a contract to convey lands. In such event the money deposited or the undertaking would not give adequate relief. *Tishman v. Acritelli*, 287.

6. *When lis pendens not canceled in such action.* Though the right to the specific performance can only be determined on trial the *lis pendens* will not be canceled when the complaint, or clearly established facts, show a right to specific performance. *Id.*

7. *Trial — suit in equity — new trial ordered when trial justice designated to Appellate Division before signing and filing decision.* Although a justice of the Supreme Court has announced his decision in an equity case before he is designated to the Appellate Division, he is thereafter disqualified from acting further in the case by section 2, article 6 of the New York Constitution, and cannot sign and file his decision. Under such circumstances there must be a new trial.

*It seems*, that such would not be the case if his term in the Appellate Division had expired and no motion had been made in the meantime for a new trial. *Williamson v. Randolph*, 589.

8. *Cause cannot await expiration of such designation.* When such trial judge is appointed to the Appellate Division for a term of five years, the cause cannot await the time when his designation expires, as section 1010 of the Code of Civil Procedure provides that if the decision be not filed within twenty days after the final adjournment of the term either party may move for a new trial. *Id.*

9. *Court cannot compel submission of case on former testimony.* When under such circumstances a new trial is ordered, the court cannot impose as a condition that it be retried on the testimony taken on the former trial, because section 3 of article 6 of the New York Constitution provides that "the testimony in equity cases shall be taken in like manner as in cases at law." *Id.*

10. *Lis pendens — when not canceled in action to set aside conveyance.* When the complaint asks that a deed whereby the plaintiff conveyed to his copartner his undivided half interest in real estate be vacated and set aside, a *lis pendens* filed by the plaintiff should not be canceled, as adequate relief cannot be granted to the plaintiff by the deposit of money or an undertaking by the defendant under section 1671 of the Code of Civil Procedure. *Wolinsky v. Okun*, 586.

11. *Plaintiff's right to relief not determined on affidavit.* The plaintiff's right to the relief demanded cannot be determined upon affidavits used on a motion to cancel a *lis pendens*, but the relief demanded in the complaint is controlling on such motion. *Id.*

12. *When deposit of money may be made.* A deposit of money or an undertaking by the defendant is adequate relief under section 1671 of the Code of Civil Procedure only when it is apparent that the only relief to which the plaintiff would be entitled would be a judgment for a sum of money which would be a lien upon the lands. *Id.*

Effect of failure to claim but one question as proper for jury — a statement by a party that he wishes to go to the jury on a specific question, followed by a mere exception to the direction of a verdict, waives the presentation to the jury of any question save the one stated.

*Wood v. Rairden*, 303.

Real property — action for specific performance of contract to purchase — when vendor's title obtained through foreclosure is marketable though service by publication was irregular — when irregularity in such service not vital — order of publication amended *nunc pro tunc*.

*Mishkind-Feinberg Realty Co., v. Sidorsky*, 578.

Eminent domain — when immediate possession of condemned lands ordered under section 3380 of the Code of Civil Procedure on payment of money — said section constitutional — failure of owner of lands to state value thereof — what constitutes public purpose.

*Matter of Niagara, Lockport & Ontario Power Co.*, 686.

Mechanic's lien on public improvement — undertaking to discharge lien may be signed by assignees of contractor — Lien Law construed — when leave to submit

**PRACTICE—Continued.**

new undertaking does not bar appeal from decision holding former bond to be insufficient.

*Matter of Hudson Water Works*, 860.

Life insurance—mutual company without stock is not a stock corporation—mandamus to compel allowance of inspection of list of members not a statutory right—common-law writ in discretion of court—when such writ will be refused.

*People ex rel. Venner v. New York Life Insurance Co.*, 183.

Mortgage—assignor of mortgage who guarantees payment proper party on foreclosure—no action against such assignor for deficiency without leave of court—complaint not showing leave of court fails to state cause of action.

*Robert v. Kidansky*, 475.

Reference to take accounts of assignee for benefit of creditors—report filed after death of assignee should be returned to referee—election of administratrix and sureties of assignee to end reference.

*Matter of Venable*, 508.

Evidence—when written statement of defendant's witness inadmissible—counsel not entitled to read such statement to witness—power of trial judge—negligence—injury while alighting from train.

*Finan v. New York Central & Hudson River R. R. Co.*, 888.

Municipal corporations—condemnation proceedings for street opening in city of New York—no appeal from order of Special Term sending back report to commissioners for correction.

*Matter of Commissioner of Public Works*, 285.

Annulment of marriage—marriage annulled when wife is under age of legal consent—woman may sue under section 1748 of the Code of Civil Procedure—decree—short form not proper.

*Wander v. Wander*, 189.

Parties—objection to defect of parties defendant must be taken by demurrer or answer—proper practice stated—objection cannot be made by motion.

*Knickerbocker Trust Co. v. Oneonta, O. & R. S. R. Co.*, 812.

*Res adjudicata*—when former judgment in summary proceedings in landlord's favor bars action by tenant to recover sums advanced on option to purchase.

*von der Born v. Schultz*, 263.

Arrest—action for goods obtained by false representation—when right to arrest may be established by affidavits, though verification of complaint defective.

*Voorhees Rubber Manufacturing Co. v. McEwen*, 541.

Criminal law—when withdrawal of counts in an indictment does not invalidate conviction under remaining counts—*nolle prosequi* abolished.

*People v. Lewis*, 553.

Municipal corporation—mandamus to compel reinstatement of superintendent of sewers of borough of Manhattan—demurrer to alternative writ sustained.

*People ex rel. Michales v. Ahearn*, 741.

Divorce—when correspondent appearing in action not entitled to retrial of issues—Code of Civil Procedure, section 1757, construed.

*Boller v. Boller*, 240.

Divorce—temporary alimony not proper while prior award of alimony in action for separation stands—excessive counsel fees.

*Schmuhlholz v. Schmahlholz*, 543.

Examination before trial—examination of defendants who deny ownership of car which injured plaintiff.

*Watt v. Feltman*, 314.

Damages—interest not recoverable on breach of covenant by tenant to repair—evidence—when objection sufficient.

*Markham v. Stevenson Brewing Co.*, 178.

Municipal Court of New York—order opening default not reviewable on appeal from judgment which has been vacated.

*Wendin v. Brooklyn Heights R. R. Co.*, 390.

**PRACTICE — Continued.**

Ejectment — when such action triable before jury although incidental equitable relief is demanded.

*Remsen v. New York, Brooklyn & M. Beach R. Co.*, 413.

Partition — when direction for sale of premises proper although there are contingent interests.

*Dwight v. Lawrence*, 616.

Mistrial — verdict received in absence of presiding justice — when irregularity waived.

*Terriberry v. Mathot*, 235.

Preferred cause — when action by receiver of corporation entitled to preference.

*Schlusinger v. Gilhooly*, 153.

Stay of proceedings for failure to pay costs of former action.

*Loftus v. Straight Line Engine Co.*, 718.

Criminal law — habeas corpus — when certificate of conviction sufficient.

*People ex rel. Cook v. Pitts*, 321.

Criminal law — habeas corpus — certificate of conviction when sufficient.

*People ex rel. Bidwell v. Pitts*, 319.

*See TRIAL.*

*See PLEADING.*

**PREFERRED CAUSE.**

On calendar.

*See CALENDAR.*

**PREMIUM.**

Of insurance.

*See INSURANCE.*

**PRESUMPTION.**

*See EVIDENCE.*

**PRINCIPAL AND AGENT.**

Conversion of stock — when transferee of messenger sent for stock liable for conversion — when messenger not clothed with indicia of title — evidence — conversations of messenger with deceased owner of stock excluded — when testimony on rebuttal founded on matter brought out on direct examination.

*Hall v. Wagner*, 70.

**PRINCIPAL AND SURETY.**

*See SURETY.*

**PRIVATE CORPORATION.**

*See CORPORATION.*

**PRIVATE BUSINESS CORPORATION.**

*See CORPORATION.*

**PRIVILEGED COMMUNICATION.**

To physician.

*See PHYSICIAN.*

**PROBATE.**

Of will.

*See WILL.*

**PROCESS.**

Real property.—action for specific performance of contract to purchase—when vendor's title obtained through foreclosure is marketable though service by publication was irregular—when irregularity in such service not vital—order of publication amended *nunc pro tunc*.

*Mishkind-Feinberg Realty Co. v. Sidorsky*, 578.

Contempt — order to show cause must be served personally — relief not asked in motion papers cannot be granted.

*Matter of Weeks v. Coe*, 337.

**PROOF.**

*See* EVIDENCE.

**PUBLIC PURPOSE.**

What constitutes.

*See* EMINENT DOMAIN.

**PUBLICATION.**

Of libel.

*See* LIBEL.

**PUNITIVE DAMAGES.**

*See* DAMAGES.

**QUANTUM MERUIT.**

Recovery on for services.

*See* SERVICES.

*See* DAMAGES.

**RAILROAD.**

1. *Street surface railways—ownership by one corporation of majority of stock of another corporation not a control thereof under section 101 of the Railroad Law.* The fact that one street surface railway corporation owns the majority of the stock of a similar corporation having a separate and distinct management, and thus might be able indirectly to control the management by the election of directors in such other company, does not constitute a control of such other corporation within the meaning of section 101 of the Railroad Law (as amd. by Laws of 1897, chap. 688), which prohibits such corporation from charging more than five-cent fares. *Senior v. New York City Railway Co.*, 39.

2. *Penalty under section 39 of the Railroad Law—when action for such penalty does not lie against corporation owning majority of stock of other corporation.* Hence, one who has been a passenger on the cars of said corporation owning the majority of the stock in the other corporation, and has paid a five-cent fare, cannot sue said corporation to recover the penalty for an overcharge in fares under section 39 of the Railroad Law, because he has been refused a transfer entitling him to ride on the cars of the other corporation, and has by it been compelled to pay another five-cent fare. *Id.*

3. *Control under Railroad Law.* The "control" of railroad lines contemplated by said section 101 of the Railroad Law means a control of the operation of the road and not merely a control of the corporation or individuals who operate it by reason of the ownership of a majority of the stock. *Id.*

Municipal corporations—fee of Fourth avenue in city of New York belongs to city—compensation for depreciation in value of abutting property by erection of railroad viaduct on said avenue.

*Caldwell v. New York & Harlem R. R. Co.*, 164.

Negligence—infant in arms killed by train while being carried across tracks—no recovery when attendant of infant guilty of contributory negligence—facts showing such contributory negligence.

*Paige v. New York Central & H. R. R. Co.*, 828.

Negligence—injury by bundle of newspapers thrown from moving train—evidence—error in excluding evidence of custom of railroad to permit throwing of papers.

*Clifford v. New York Central & H. R. R. Co.*, 809.

Negligence—passenger thrown from car while riding on platform—failure to show negligence of defendant—contributory negligence.

*Kiefer v. Brooklyn Heights R. R. Co.*, 404.

Negligence—injury to eye of fireman by explosion of water gauge—failure to show negligence of defendant.

*Healy v. Buffalo, Rochester & Pittsburgh Railway Co.*, 618.

Injury on.

*See* NEGLIGENCE.

**REAL PROPERTY.**

1. *Trespass by cutting timber — reservation of right to cut timber construed — when no time set timber must be removed within reasonable time — when such right not acquired by prescription.* In an action for trespass upon plaintiff's land by cutting and taking timber therefrom it was shown that plaintiff's predecessor in title, one M., in 1856, had conveyed the farm by contract and subsequent warranty deed containing a reservation in these words, "excepting and reserving the standing timber on the south end of farm \* \* \* and the right of way to and therefrom." The lands came to the plaintiff by several mesne conveyances containing similar reservations. It was shown that one of the intermediate owners of said land had agreed with the grantee of other lands from the original owner that the timber should be removed under said reservation within four years.

*Held*, that when the grantor of lands has reserved the right to remove timber therefrom, and no time is specified in which to remove it, a reasonable time only is intended;

That the reservation aforesaid must be construed to mean that the grantor or his successors in title must remove the timber within a reasonable time, and that at the expiration of such reasonable time the timber remaining became the property of the grantee;

That under the circumstances said reasonable time had expired, and that the plaintiff was entitled to recover for the timber cut by the defendant;

That, although the defendant's predecessors in title had resided upon the lands received from the original grantor for twenty-six years, and during that time had taken wood and timber under the so-called "reservation," such fact was insufficient to establish a right to take such timber by prescription;

*Held*, further, that the acquiescence of plaintiff's predecessors in title in the taking of such timber by the defendant's predecessors in title did not bar the plaintiff from insisting that the defendant must cease from taking such timber after the reasonable time to remove the same had expired. *Decker v. Hunt*, 821.

2. *Injury to shade trees by erection of telephone poles — damage recoverable when injury is wanton — when complaint dismissed for failure to show damage.* Although in an action by the owner of lands in a city to restrain a telephone company from erecting poles along the premises and for damage for "wrongfully, willfully and wantonly, without authority," destroying shade trees to plaintiff's damage of \$1,000, the plaintiff may be entitled to recover if the said destruction of the trees was wanton, etc., yet if the plaintiff has failed to give evidence of any damage, a dismissal of the complaint on the merits without prejudice to an action for damages by the plaintiff is proper. *Osborne v. Auburn Telephone Co.*, 702.

3. *Damage.* Even though such defendant may act under legal authority in erecting its poles, it is liable for damage if an injury to property in so doing be "wanton and willful."

*It seems*, also, that compensation to an owner of city lands will be awarded if a telephone company in the prosecution of its business mutilates the trees of such landowner to such an extent as substantially to lessen the value of the premises. *Id.*

4. *Action for specific performance of contract to purchase — when vendor's title obtained through foreclosure is marketable though service by publication was irregular.* The title of a purchaser of real estate on foreclosure is marketable, although at the time the summons in the action of foreclosure was served by publication upon one of the defendants it had been ordered that a supplemental summons issue to bring in certain tenants, which supplemental summons was not served on said defendant, who was served only with the original summons, which named her as defendant. Such defendant having been summoned to answer on her own account, it is immaterial that the summons did not contain the names of tenants made parties only to foreclose their rights as such. *Mishkind-Feinberg Realty Co. v. Sidorsky*, 578.

5. *When irregularity in such service not vital.* Neither is the title unmarketable because the order of publication required "notice of object of action" to be served instead of the "complaint," as required by section 440 of the Code of Civil Procedure, if in fact the complaint was served together with such notice of

**REAL PROPERTY — Continued.**

object of action and the order of publication thereafter was corrected and filed *nunc pro tunc*. *Id.*

6. *Order of publication amended nunc pro tunc.* While an order cannot be made *nunc pro tunc* to supply a jurisdictional defect by requiring to be done something which has not been done, such order may be so corrected when the thing has in fact been done. *Id.*

7. *Evidence — when oral contract for sale of lands not merged in written receipt for deposit — when parol evidence of oral contract admissible.* In an action by the vendee of lands to recover a deposit paid under a parol agreement of sale, the fact that the vendor has executed a written receipt for the payment setting forth part of the contract but not all of it, and contemplating a written contract in the future, does not make parol evidence inadmissible to show the original oral contract, for the same is not merged in such incomplete writing. *Winter v. Friedman*, 306.

8. *Action for damages for injury to value thereof by elevated railway.* Although a plaintiff cannot recover damages in an action for injury to the rental value of lands caused by the erection of an elevated railway when it is shown that the erection of the railway increased the value of the property, yet a recovery is proper when it is shown that the increased value of the premises resulted from other causes, as the building of a bridge, a subway, improvement of the locality, etc. *Schmitz v. Brooklyn Union Elevated R. R. Co.*, 308.

9. *Measure of damages.* Under such circumstances an award of damages is not inconsistent with the finding that the property has been benefited by the elevated railway, if in other respects the value of the premises has been decreased. The damage is the excess of the injury caused over the benefits received. *Id.*

10. *Error in awarding damages.* However, as the value of the easements of such owner in light and air, if any, is nominal, it is reversible error for the court to make an award taking the same as of substantial value, and such an erroneous valuation is shown by a refusal to find that such easements, if any, and the damage thereto are of nominal value. *Id.*

11. *Injury to real estate by elevated railroad viaduct not damnum absque injuria.* The injury to adjoining property caused by the heightening of an embankment railroad viaduct in the city of New York, pursuant to Laws of 1892, chapter 339, as amended, is not *damnum absque injuria*, and it is error to dismiss the complaint in an action for injunction and damages by the owner of such adjoining property on the grounds aforesaid. *Wallach v. New York & Harlem R. R. Co.*, 273.

Creditor's bill to set aside conveyance — evidence — when deposition of grantor on supplementary proceedings casts burden on grantee to disprove fraud — failure to object to such deposition as hearsay — evidence of value of lands — in creditor's action court may set aside deed or declare it to be a mortgage.

*Lawrence Brothers, Inc., v. Heylman*, 848.

Injunction — landowner restrained from encroaching on street by windows and portico — restrictive covenant by landowners to set back building line — municipal corporations — municipal authorities of city of New York without power to license permanent encroachments on public streets.

*Williams v. Silverman Realty & Construction Co.*, 879.

Eminent domain — when immediate possession of condemned lands ordered under section 3390 of the Code of Civil Procedure on payment of money — said section constitutional — failure of owner of lands to state value thereof — what constitutes public purpose.

*Matter of Niagara, Lockport & Ontario Power Co.*, 686.

Lunatic — committee cannot authorize sale of timber on lands of lunatic without permission of court — committee entitled to recover value of timber so cut, although the defendant has paid therefor to the husband and son of the lunatic.

*Scribner v. Young*, 814.

**REAL PROPERTY — Continued.**

*Lis pendens* — right thereto determined by complaint — when cancellation of *lis pendens* refused — merits of action not determined on motion to cancel *lis pendens*.  
*Lindheim & Co. v. Central Nat. Realty & Construction Co.*, 275.

Covenant not to erect tenement house — such covenant not violated by erection of apartment house — burden of proof to show meaning of covenant.

*Marx v. Brogan*, 480.

Will — residuary clause construed — absolute gift cut down by subsequent limitation — when next of kin of deceased residuary legatee not entitled to share in residuary estate.

*Matter of Wiley*, 590.

Will construed — devise of life interest with contingent remainders over — when life tenant cannot compel specific performance by vendee of contract of purchase.

*Webel v. Kelly*, 521.

Landlord and tenant — eviction by failure of lessor to keep building safe — when damages recoverable for breach of covenant for quiet enjoyment.

*Lindvall v. May*, 457.

Partnership to speculate in lands — injunction — when carrying out of contract of sale made by one partner will not be enjoined.

*Babcock v. Leonard*, 294.

Creditor's bill — failure to show conveyance to be fraudulent — evidence — when deposition of grantor inadmissible against grantee.

*Wadleigh v. Wadleigh*, 367.

Landlord and tenant — action for use and occupation after notice to vacate — when recovery limited to rental stated in lease.

*Stevens v. City of New York*, 362.

Damages — interest not recoverable on breach of covenant by tenant to repair — evidence — when objection sufficient.

*Markham v. Stevenson Brewing Co.*, 178.

Watercourse — duty to keep artificial ditch unobstructed — owner liable for want of reasonable care — charge.

*Branson v. New York Central & H. R. R. Co.*, 737.

Chattel mortgage — when not paid by delivery of defective real mortgage in lieu thereof.

*Shaw v. Cooke*, 202.

Specific performance — when vendor not entitled to reimbursement for taxes paid.

*Kissick v. Rees*, 292.

Negligence — city joint tortfeasor with landowner making excavation under municipal permit.

*Parks v. City of New York*, 836.

Nuisance — damages to lessee of adjoining property by operation of electric light plant.

*Bly v. Edison Electric Illuminating Co.*, 170.

Easement in.

See EASEMENT.

Partition of.

See PARTITION.

Tax on.

See TAX.

Devise of.

See WILL.

See DEED.

See EJECTMENT.

See LANDLORD AND TENANT.

See MORTGAGE.

See TRESPASS.



**RECEIVER.**

*When not appointed in action to recover corporate assets.* When the allegations of the complaint in an action by a stockholder to recover corporate assets alleged to have been fraudulently converted are all made upon information and belief, a receiver *pendente lite* should not be appointed when the answering affidavits specifically deny the allegations of the complaint and state facts which exculpate the defendants from misconduct. *Weber v. Willerstein* (No. 2), 700.

Preferred cause — when action by receiver of corporation entitled to preference. *Schlesinger v. Gilhooly*, 158.

See CORPORATION.

**REFERENCE.**

1. *To take accounts of assignee for benefit of creditors — report filed after death of assignee should be returned to referee.* A report of a referee appointed to take and state the accounts of an assignee for the benefit of creditors, which is filed after the death of the assignee, is a nullity and should be returned to the referee to enable him to proceed with the reference on the substitution of the administratrix of the assignee, as required by section 10 of the General Assignment Act. *Matter of Venable*, 508.

2. *Election of administratrix and sureties of assignee to end reference.* But such administratrix or the sureties of a deceased assignee, parties to the proceeding, may avail themselves of section 1019 of the Code of Civil Procedure and elect to end the reference, on the ground that the referee's report was not filed or delivered to the attorneys of one of the parties within sixty days from the time the case was finally submitted. *Id.*

3. *Rehearing — when refused.* When notice of such election to end the reference is served, the court should refuse to reopen the reference or direct a further hearing before the same referee. *Id.*

Transfer tax — surrogate has power to order reference to determine question of residence of decedent.

*Matter of Bishop*, 545.

**RELATIONSHIP.**

See PEDIGREE.

**REMAINDER.**

In real property.

See REAL PROPERTY.

**RES ADJUDICATA.**

See JUDGMENT.

**RESTRICTIVE COVENANT BETWEEN LANDOWNERS.**

See CONTRACT.

**RIPARIAN RIGHTS.**

1. *Eminent domain — constitutional law — charter of the Niagara County Irrigation and Water Supply Company did not require assent of two-thirds of Legislature.* The charter of the Niagara County Irrigation and Water Supply Company (Laws of 1891, chap. 259, §§ 4, 6), authorizing said corporation to take water from the Niagara river and to construct, operate and maintain canals, provided pipes or tunnels under the waters of the Niagara river are so laid and constructed as not to interfere with the navigation of said river, does not appropriate any property of the State to the use of the corporation either in the waters or bed of the stream. Hence, said act did not violate the provisions of section 9 of article 1 of the State Constitution of 1846, then in force, in not receiving the assent of two-thirds of the members elected to each branch of the Legislature. *Niagara County I. & W. S. Co. v. College Heights L. Co.*, 770.

2. *Rights of State in waters and bed of Niagara river.* The State has no ownership of the waters of the Niagara river, and, while in a certain sense it is the owner of the bed of said river, it holds not as a proprietor but as sovereign in trust for the people. Said charter does not confer upon the corporation the right to take or make use of the property of other persons or of the State until it has acquired such property in a legal way. *Id.*

**RIPARIAN RIGHTS—Continued.**

Watercourse — erroneous finding as to height of crest of dam — height of dam to be taken from level of average flow of stream, not from the minimum level.

*Remington Pulp & Paper Co. v. Water Commissioners of City of Watertown, 907.*

Municipal corporations — town of North Hempstead not owner of lands under water south of Saddle Rock in Little Neck bay.

*Town of North Hempstead v. Eldridge, 789.*

**RULE.**

[See table of Rules cited, *ante*, in this volume.]

**SALE.**

1. *Conversion — secured debt sold as worthless by assignee for benefit of creditors — mutual mistake of fact — error in excluding evidence that purchaser did not know debt was secured — when sale should be rescinded because minds of parties have not met — counterclaim asking rescission requires reply.* The plaintiff's assignor pledged securities with certain brokers as collateral security for speculations in stock on a margin. After a general assignment for the benefit of creditors by said brokers, the assignee, not knowing that the plaintiff's assignor's debt to the brokers was secured, scheduled the debt as worthless and sold the same at auction for a nominal sum, the debt being bought in by an attorney acting in the interest of the plaintiff's assignor. Thereafter the plaintiff's attorney demanded the security as an incident to the debt purchased, but the assignee refused to deliver the same, offering to return the amount paid at auction for the debt. In an action against said assignee for the benefit of creditors for a conversion of said security, he set up as a defense his lack of knowledge that the debt was secured, and as a counterclaim prayed for a decree rescinding the sale of the debt.

*Held*, that it was error to exclude testimony by the attorney who purchased the debt showing that he did not know that the debt was secured when he bought it, and his answers to questions inquiring how he came to buy the account. As it appeared that the defendant did not know that the debt was secured, such testimony tended to show that the parties had made a mutual mistake concerning a material fact which would have required a rescission of the sale.

*Held*, further, that, though collateral security follows the debt, as the parties to the sale were equally ignorant that the debt sold was secured, a rescission of the contract may be had not only on the ground of fraud or mutual mistake, but also upon the ground that, owing to a lack of knowledge of a material fact, the minds of the parties had never met.

*Held*, further, that, as the counterclaim asked the rescission of the sale as affirmative relief and the plaintiff had not replied thereto, the defendant's motion for judgment on the counterclaim should have been granted. *Flynn v. Smith, 870.*

2. *Conditional sale — when goods are retaken by vendor the consideration of notes given for purchase price fails.* When, after a sale and delivery of goods and a failure of the vendee to pay therefor within the time set, the parties have entered into a written agreement that the sale shall be conditional with the right in the vendor to retake possession on the failure of the vendee to pay notes given for a balance due, and the vendor has asserted his title and retaken possession, he cannot thereafter recover the purchase price, and the consideration for the notes fails. *Cooper v. Payne, 785.*

3. *Vendor not entitled to apply proceeds of sale of goods on notes.* Neither can the vendor sell the goods reclaimed and apply the proceeds on said notes as the whole original indebtedness is wiped out. *Id.*

4. *Retaking of property inconsistent with affirmance of sale.* Nor can the vendor maintain in an action on such notes that his negotiation of the notes and retaking of property showed an election to affirm the sale. If so, the retaking of the property was conversion and he cannot assert his own wrong as a reason why he should recover on the notes. *Id.*

5. *Contract to deliver goods F. O. B. — failure to show delivery.* When a contract for the sale and delivery of advertising posters provides that they are to be delivered by the vendor F. O. B. at the city where the vendee resides, and the only evidence of delivery shows that some of them were delivered to a bill-posting

**SALE** — *Continued.*

company in that city, which company posted a few of them, but no delivery to the defendant is shown, it is error for the court to direct a verdict for the vendor. The question of delivery is for the jury. *Sackett & Wilhelm Lith. & Print. Co. v. Cummins*, 300.

6. *Letter as admission of delivery.* A letter of the vendee to the vendor repudiating the order for the posters given by his agent, which letter was written on first learning of the order, is not as a matter of law an admission of delivery, but at the most raises a question for the jury.

GAYNOR, J. (concurring in result only): Delivery to the bill-posting company would have been delivery to the defendant; but no such delivery was shown, for the fact that the bill-posting company posted a few of the posters does not show that it received the whole order. *Id.*

7. *When contract for sale of goods not entire.* When the vendor has named the price of certain goods, and the vendee has ordered some of them, which were delivered but not paid for, and the vendee subsequently orders other goods, which the vendor refuses to deliver without payment, the contract of sale is not entire, and the refusal of the vendor to deliver the last orders does not prevent a recovery for the goods previously delivered. *Williams v. Wilson & McNeal Co.*, 442.

8. *Payment.* In the absence of a contract giving credit the vendor may require payment on delivery. *Id.*

9. *Finding that there was no "delivery" construed.* A finding by the court that certain goods were ordered but not "delivered" is not equivalent to a finding that the vendor has broken the contract, as such finding may mean only that the vendor refused to turn over the goods, which he had a right to do. *Id.*

**Mortgage** — realty and chattel mortgage securing same debt — agreement that resort shall first be had to the realty mortgage — mortgagors not damaged by violation of said agreement by sale under chattel mortgage which conveyed no interest — counterclaim for such damage properly dismissed in action to foreclose realty mortgage.

*McEchron v. Martine*, 805.

Injunction to restrain sale of collateral security — when remedy at law adequate — complaint — failure to show irreparable damage and that remedy at law is inadequate.

*Ehrich v. Grant*, 196.

**Partnership** — when new partnership cannot recover on unperformed contract of sale made by former partnership.

*Piper v. Seager*, 113.

**Assignment** — parol assignment of written contract — when assignee can recover thereon — erroneous charge.

*St. Regis Paper Co. v. Page Lumber Co.*, 108.

**Life insurance corporation** — when sale of assets to other corporation valid.

*Raymond v. Security Trust & Life Insurance Co.*, 191.

**Of real property.**

*See* VENDOR AND PURCHASER.

**SATISFACTION OF JUDGMENT.**

*See* JUDGMENT.

**SCAFFOLD.**

**Injury on.**

*See* NEGLIGENCE.

**SEPARATION.**

**Of husband and wife.**

*See* HUSBAND AND WIFE.

**SERVICE.**

**Of process.**

*See* PROCESS.

**SERVICES.**

Executors and administrators — claim against estate for board furnished by decedent's daughter — failure to show promise to pay — when no recovery on *quantum meruit*.

*Conway v. Cooney*, 864.

Contract for.

*See* CONTRACT.

**SESSION LAWS.**

1862, chap. 18, § 107 — Certiorari to review assessment for sewer in city of Utica.

*People ex rel. Keim v. Desmond*, 757.

1872, chap. 625 — Municipal corporations — certiorari to review assessment for sewer in city of Utica — assessment confirmed.

*People ex rel. Keim v. Desmond*, 757.

1875, chap. 611, § 17 — Corporations — written declarations in claimant's own behalf inadmissible — stock certificate book not made evidence by statute.

*Geneva Mineral Springs Co., Limited, v. Steele*, 706.

1877, chap. 466, § 10 — Reference to take accounts of assignee for benefit of creditors — report filed after death of assignee should be returned to referee — election of administratrix and sureties of assignee to end reference.

*Matter of Venable*, 508.

1878, chap. 818 — Reference to take accounts of assignee for benefit of creditors — report filed after death of assignee should be returned to referee — election of administratrix and sureties of assignee to end reference.

*Matter of Venable*, 508.

1887, chap. 713 — Tax Law — inheritance tax on property of non-resident — when trust funds passing under power of appointment taxable — when legacy not taxable.

*Matter of Lord*, 152.

1890, chap. 565, §§ 89, 101 — Street surface railways — ownership by one corporation of majority of stock of another corporation not a control thereof under section 101 of the Railroad Law — penalty under section 89 of the Railroad Law — when action for such penalty does not lie against corporation owning majority of stock of other corporation.

*Senior v. New York City Railway Co.*, 89.

1891, chap. 84 — Inheritance tax — valuation of unlisted stock in private corporation.

*Matter of Curtice*, 280.

1891, chap. 215 — Tax Law — inheritance tax on property of non-resident — when trust funds passing under power of appointment taxable — when legacy not taxable.

*Matter of Lord*, 152.

1891, chap. 259, §§ 4, 6 — Eminent domain — constitutional law — charter of the Niagara County Irrigation and Water Supply Company did not require assent of two-thirds of Legislature — rights of State in waters and bed of Niagara river.

*Niagara County I. & W. S. Co. v. College Heights L. Co.*, 770.

1892, chap. 339 — Municipal corporations — fee of Fourth avenue in city of New York belongs to city — compensation for depreciation in value of abutting property by erection of railroad viaduct on said avenue.

*Caldwell v. New York & Harlem R. R. Co.*, 164.

1892, chap. 685, § 12 — Municipal corporations — treasurer of Delaware county not authorized to pay over to towns taxes received from railroads — failure of said treasurer to show that town received the benefit of such payment — Laws of 1903, chapter 515, unconstitutional as applied to this case.

*Town of Walton v. Adair*, 817.

1892, chap. 686, § 22 — Municipal corporations — Election Law construed — aldermen of city of New York empowered to designate newspapers to publish notices — when newspaper can recover for such publication under former designation not revoked.

*Standard Publishing Co. v. City of New York*, 260.

**SESSION LAWS—Continued.**

1892, chap. 688—Life insurance—mutual company without stock is not a stock corporation.

*People ex rel. Venner v. New York Life Insurance Co.*, 183.

1893, chap. 466—Municipal corporations—treasurer of Delaware county not authorized to pay over to towns taxes received from railroads—failure of said treasurer to show that town received the benefit of such payment—Laws of 1903, chapter 515, unconstitutional as applied to this case.

*Town of Walton v. Adair*, 817.

1894, chap. 334, § 83—Highway Law—highway commissioners may waive notice of application to lay out road—when public officers may waive statutory provisions.

*Matter of Wood*, 781.

1896, chap. 57—Municipal corporations—commissioner of highways of city of New York is without authority to employ engineer on commission to draw plans for entrance to Grand Boulevard.

*Hildreth v. City of New York*, 63.

1896, chap. 112, § 11, subd. 2—Liquor Tax Law—when certiorari refused to review right of Commissioner of Excise to make enumeration of inhabitants of city and to increase cost of liquor tax certificate.

*People ex rel. Flinn v. Cullinan*, 32.

1896, chap. 272, art. 1, § 4—Annulment of marriage—marriage annulled when wife is under age of legal consent—woman may sue under section 1743 of the Code of Civil Procedure—decree—short form not proper.

*Wander v. Wander*, 189.

1896, chap. 272, § 21—Husband and wife—husband's contract for support after separation is enforceable—jurisdiction of Municipal Court of New York.

*Reardon v. Woerner*, 259.

1896, chap. 547, § 200—Landlord and tenant—action for use and occupation after notice to vacate—when recovery limited to rental stated in lease.

*Stevens v. City of New York*, 302.

1896, chap. 932—Corporation—action by stockholder to dissolve corporation and set aside prior voluntary dissolution—complaint—failure to state cause of action.

*Knickerbocker v. Groton Bridge & Manufacturing Co.*, 145.

1897, chap. 312—Liquor Tax Law—when certiorari refused to review right of Commissioner of Excise to make enumeration of inhabitants of city and to increase cost of liquor tax certificate.

*People ex rel. Flinn v. Cullinan*, 32.

1897, chap. 378, §§ 413, 455–457 526—Municipal corporations—commissioner of highways of city of New York is without authority to employ engineer on commission to draw plans for entrance to Grand Boulevard.

*Hildreth v. City of New York*, 63.

1897, chap. 378, § 1586—Municipal corporations—Election Law construed—aldermen of city of New York empowered to designate newspapers to publish notices—when newspaper can recover for such publication under former designation not revoked.

*Standard Publishing Co. v. City of New York*, 260.

1897, chap. 418, art. 1—Mechanic's lien—no lien for tearing down buildings under contract to erect other buildings—no recovery on *quantum meruit* may be had in an action on a mechanic's lien when the lien not established—when architect's certificate necessary.

*Thompson-Starrett Co. v. Brooklyn Heights Realty Co.*, 358.

1897, chap. 679—Municipal corporations—commissioner of highways of city of New York is without authority to employ engineer on commission to draw plans for entrance to Grand Boulevard.

*Hildreth v. City of New York*, 63.

1897, chap. 688—Street surface railways—ownership by one corporation of majority of stock of another corporation not a control thereof under section 101 of the Railroad Law.

*Senior v. New York City Railway Co.*, 39.

**SESSION LAWS**—*Continued.*

1897, chap. 738, § 11, subd. 5—Municipal corporations—certiorari to review assessment for sewer in city of Utica—assessment confirmed.

*People ex rel. Keim v. Desmond*, 757.

1900, chap. 760—Corporation—action by stockholder to dissolve corporation and set aside prior voluntary dissolution—complaint—failure to state cause of action.

*Knickerbocker v. Groton Bridge & Manufacturing Co.*, 145.

1901, chap. 354—Life insurance—mutual company without stock is not a stock corporation.

*People ex rel. Venner v. New York Life Insurance Co.*, 183.

1901, chap. 384—Municipal corporations—certiorari to review assessment for sewer in city of Utica—assessment confirmed.

*People ex rel. Keim v. Desmond*, 757.

1901, chap. 466, § 988—Municipal corporations—condemnation proceedings for street opening in city of New York—no appeal from order of Special Term sending back report to commissioners for correction.

*Matter of Commissioner of Public Works*, 285.

1901, chap. 466, § 1543—Municipal corporation—mandamus to compel reinstatement of superintendent of sewers of borough of Manhattan—said office not created by charter or under power conferred thereby—demurrer to alternative writ sustained—present incumbent of office not necessary party.

*People ex rel. Michales v. Ahearn*, 741.

1901, chap. 466, § 1536—Municipal corporations—Election Law construed—aldermen of city of New York empowered to designate newspapers to publish notices—when newspaper can recover for such publication under former designation not revoked.

*Standard Publishing Co. v. City of New York*, 260.

1902, chap. 580, § 257—Municipal Court of New York—order opening default not reviewable on appeal from judgment which has been vacated.

*Wendin v. Brooklyn Heights R. R. Co.*, 390.

1903, chap. 85—Annulment of marriage—marriage annulled when wife is under age of legal consent—woman may sue under section 1743 of the Code of Civil Procedure—decree—short form not proper.

*Wander v. Wander*, 189.

1903, chap. 115—Liquor Tax Law—when certiorari refused to review right of Commissioner of Excise to make enumeration of inhabitants of city and to increase cost of liquor tax certificate.

*People ex rel. Flinn v. Cullinan*, 32.

1903, chap. 515—Municipal corporations—treasurer of Delaware county not authorized to pay over to towns taxes received from railroads—failure of said treasurer to show that town received the benefit of such payment—Laws of 1903, chapter 515, unconstitutional as applied to this case.

*Town of Walton v. Adair*, 817.

1904, chap. 696—Deposition—examination of officer of corporation—Code of Civil Procedure, §§ 870, 872, 873 and rule 82, construed—matters not a defense to such application—laches no bar.

*Goldmark v. U. S. Electro-Galvanizing Co.*, 526.

1904, chap. 755—Trustees receiving specific stock in trust for life beneficiary are entitled to receive one-half commissions thereon.

*Robertson v. de Brulatour*, 882.

1905—chap. 60—*Lis pendens*—Code of Civil Procedure, section 1671, construed—specific performance—when *lis pendens* not canceled in such action.

*Tishman v. Acritelli*, 237.

1905, chap. 476—Constitutional law—when local bill not unconstitutional in embracing subject not expressed in title.

*City of Elmira v. Seymour*, 199.

[See tables of Statutes and Session Laws cited, *ante*, in this volume.]

**SET-OFF.**

Mortgage — realty and chattel mortgage securing same debt — agreement that resort shall first be had to the realty mortgage — mortgagors not damaged by violation of said agreement by sale under chattel mortgage which conveyed no interest — counterclaim for such damage properly dismissed in action to foreclose realty mortgage.

*McElchorn v. Martine*, 805.

**SEWAGE.**

*See* MUNICIPAL CORPORATION.

**SHERIFF.**

Conversion by sheriff selling under execution — when surety who indemnifies sheriff liable to mortgagor.

*Sloan v. National Surety Co.*, 94.

**SLANDER.**

1. *Words charging one with exacting commissions — complaint — meaning of words dependent on extrinsic facts must be alleged.* Spoken words which charge an employee with demanding a commission of others on hiring them for his employer do not charge a crime and are not slanderous *per se*. If they have a slanderous meaning dependent upon extrinsic facts, such meaning must be alleged or the complaint fails to state a cause of action. *Russell v. Barron*, 382.

2. *Innocent interpretation.* When words may be slanderous or innocent, dependent upon extrinsic facts, they will be given an innocent interpretation as a matter of law, if no question for the jury is raised by proper allegation as aforesaid. *Id.*

**SNOW.**

*See* ICE.

**SPECIFIC PERFORMANCE.**

1. *When vendor not entitled to reimbursement for taxes paid.* The vendor, in a contract for the sale of real estate, who fails to deliver a deed of the premises at the time agreed upon, and who pays taxes which became a lien upon the premises subsequent to the time stipulated for the delivery of the deed and before the commencement of an action by the vendee to compel specific performance, which action was adjusted by the allowance to the vendee of the rental value of the premises from the date when the deed should have been given, and to the vendor interest on the purchase price during the same period, cannot recover the moneys so paid for taxes. *Kissick v. Rees*, 292.

2. *Equitable adjustment.* The vendor, by his wrongful act, having compelled the vendee to resort to a court of equity for relief, no consideration of equity would warrant the court in making a new adjustment between the parties by imposing the taxes on the vendee. *Id.*

3. *When prior false representations of plaintiff waived by defendant.* When, in an action for the specific performance of a contract to assign a mortgage, it is shown that though the defendant had made a former agreement to execute releases of said mortgage on the false representation of the plaintiff that he was the owner of the mortgaged premises, the defendant, subsequent to the discovery of the fraud, has agreed to assign the mortgage and has accepted the consideration, there is a waiver of the prior fraud of the plaintiff and he is entitled to specific performance or damages for a breach of contract. *Urbansky v. Shirmer*, 50.

4. *When promise to assign mortgage shown by promise to deliver same.* A promise by the holder of a mortgage on delivering a release thereof that he will also deliver the bond and mortgage when he finds it, is an agreement to assign the same, for title to a bond and mortgage can pass by delivery. *Id.*

5. *Adequate remedy at law not pleaded.* In an action for specific performance, the defense that the plaintiff has an adequate remedy at law must be pleaded to be available. *Id.*

6. *Tender — when plaintiff not bound to accept offer to return consideration.* In such action the plaintiff is not bound to accept a tender by the defendant of the consideration paid, but may insist upon specific performance or damages for the breach of the contract. *Id.*

**SPECIFIC PERFORMANCE** — *Continued.*

Real property — action for specific performance of contract to purchase — when vendor's title obtained through foreclosure is marketable though service by publication was irregular — when irregularity in such service not vital — order of publication amended *nunc pro tunc*.

*Mishkind-Feinberg Realty Co. v. Sidorsky*, 578.

Plaintiff must show performance on his part — when complaint for specific performance not amendable to allow recovery on *quantum meruit*.

*Flanders v. Rosoff*, 1.

Will construed — devise of life interest with contingent remainders over — when life tenant cannot compel specific performance by vendee of contract of purchase.

*Webel v. Kelly*, 521.

*Lis pendens* — Code of Civil Procedure, section 1671, construed — specific performance — when *lis pendens* not canceled in such action.

*Tishman v. Acritelli*, 287.

**STATUTE.**

*See* SESSION LAWS.

[Also see table of the sections of the Revised Statutes cited, *ante*, in this volume.]

**STATUTE OF FRAUDS.**

*See* REAL PROPERTY.

**STATUTE OF LIMITATIONS.**

*See* LIMITATION OF ACTION.

**STAY.**

*Proceedings for failure to pay costs of former action.* When a plaintiff brings a second action without paying the costs of a former action, the court will order payment of the costs in the first suit before allowing the second to proceed.

This is so although the defendant answers in the second suit before moving for the stay. *Loftus v. Straight Line Engine Co.*, 718.

**STIPULATION.**

Evidence — privilege of communications to physician not waived by taking deposition of such physician — privilege of physician can only be waived in open court or by stipulation.

*Clifford v. Denver & Rio Grande Railroad Co.*, 513.

**STOCK.**

Testamentary trust — life beneficiary of the income and dividends of specific stock placed in trust is entitled to receive dividends declared thereon — distinction in this respect between trust of specific stock and trust of a fund of money — subscription rights accruing on such stock go to increase corpus of the trust — unnecessary to provide a sinking fund to provide against depreciation in value of specific securities — trustees receiving such specific stock entitled to one-half commissions — when life beneficiary entitled to act as trustee — when life beneficiary acting as trustee entitled to commissions.

*Robertson v. de Brulatour*, 882.

Conversion of.

*See* CONVERSION.

In a corporation.

*See* CORPORATION.

**STOCKHOLDER'S ACTION.**

*See* CORPORATION.

**STREET.**

In a city.

*See* MUNICIPAL CORPORATION.

**STREET RAILROAD.**

*See* RAILROAD.



**SUBSTITUTION.**

Of a new attorney.

*See* ATTORNEY AND CLIENT.

**SUMMARY PROCEEDINGS.**

*Res adjudicata* — when former judgment in summary proceedings in landlord's favor bars action by tenant to recover sums advanced on option to purchase.  
*von der Born v. Schultz*, 263.

**SUPPLEMENTARY PROCEEDINGS.**

Creditor's bill to set aside conveyance — evidence — when deposition of grantor on supplementary proceedings casts burden on grantee to disprove fraud — failure to object to such deposition as hearsay — evidence of value of lands — in creditor's action court may set aside deed or declare it to be a mortgage.

*Laurence Brothers, Inc., v. Heylman*, 848.

Evidence — when testimony of husband on supplementary proceedings is not admissible in subsequent action against wife.

*Leggett v. Schwab*, 841.

**SURETY.**

*Bond to secure proper performance of contract* — when surety is bound by parol waivers of provisions of contract — *estoppel of surety*. Although the provisions of a contract of suretyship cannot be waived so as to bind the surety, except by an agreement in writing, yet where a surety has given a bond to secure the proper performance of a contract to excavate rock, and at the instance of the contractor the surety has consented that the time of the performance of the contract be extended, and that percentages which were to be retained be paid to the contractor to enable him to continue the work, such waivers of the terms of the contract inure to the benefit of the surety and it is estopped from asserting that it is relieved from liability thereby, although the waiver as to the payments to the contractor were made by parol. *Hellman v. City Trust, Safe Deposit & Surety Co.*, 879.

Reference to take accounts of assignee for benefit of creditors — report filed after death of assignee should be returned to referee — election of administratrix and sureties of assignee to end reference.

*Matter of Venable*, 508.

When surety who indemnifies sheriff liable to mortgagee.

*Sloan v. National Surety Co.*, 94.

**SURROGATE.**

Power of surrogate to order reference to determine amount of attorney's compensation for services to executors.

*Matter of Smith*, 23.

Transfer tax — surrogate has power to order reference to determine question of residence of decedent.

*Matter of Bishop*, 545.

**TAX.**

1. *Inheritance tax — valuation of unlisted stock in private corporation.* A large but minority holding of unlisted stock in a private business corporation controlled by a family should not be valued at the record figures of isolated sales of small blocks thereof in assessing an inheritance tax thereon. The value of a large block of such unlisted stock not conveying a controlling interest may be less for the purposes of sale than the figures shown by records of sporadic sales of small parcels of such stock, and when there is uncontradicted evidence that the value of such stock is \$80 and \$90 a share the appraisal thereof at \$1.0 and \$107.50 solely on the record of isolated sales at such figures is too high. *Matter of Curtice*, 230.

2. *Record sales inapplicable.* It seems, that when such stock is not the subject of free and customary market dealing, the manner of appraisal by record sales provided by Laws of 1891, chapter 34, does not apply. *Id.*

3. *Inheritance tax — when situs of property immaterial — property passing under power of appointment exercised by resident is taxable.* The liability of property to an inheritance tax does not depend upon the location of such property, but upon whether the beneficiary came into possession through the exercise of a privilege conferred by the State.

**TAX — Continued.**

Hence, when the donee of a power of appointment, who is a resident of this State and received such power from a testatrix who was also a resident, exercises that power, the property is subject to an inheritance tax, although situated in another State.

There is no distinction made in this respect between real and personal property. *Matter of Hull*, 323.

4. *Transfer tax — surrogate has power to order reference to determine question of residence of decedent.* When, in a proceeding to appraise the estate of a decedent for the purpose of levying a transfer tax, the question as to whether the decedent was a resident of this state is at issue, the surrogate has power, under section 2546 of the Code of Civil Procedure, to refer the question to a referee to take testimony and report with an opinion, and to direct that the appraiser await the coming in of such report.

The surrogate is not bound to decide such question of residence on the evidence taken before the appraiser. *Matter of Bishop*, 545.

5. *Inheritance tax on property of non-resident — when trust funds passing under power of appointment taxable.* When a non-resident testatrix makes a bequest of property within this State which came to her as the corpus of a trust estate of which her husband was beneficiary, and over which he had a power of disposal, the same is subject to a transfer tax under the Laws of 1887, chapter 713, and the Laws of 1891, chapter 215, then in force, because on the exercise of the power of disposal the wife's title relates back to the instrument creating the trust, and her title is absolute on the death of the beneficiary. *Matter of Lord*, 152.

6. *When legacy not taxable.* But property within this State which came to such non-resident testatrix as residuary legatee of her non-resident husband, whose will was not admitted to probate until after the death of said testatrix, is not property within this State under the meaning of the act aforesaid, and hence is not subject to taxation, because the right of the testatrix as such residuary legatee was not a right to any particular property, but a right only to an undetermined balance due after payment of debts and expenses of administration. *Id.*

Municipal corporations — treasurer of Delaware county not authorized to pay over to towns taxes received from railroads — failure of said treasurer to show that town received the benefit of such payment — Laws of 1903, chapter 515, unconstitutional as applied to this case.

*Town of Walton v. Adair*, 817.

**TAXATION.**

Of costs.

*See COSTS.*

**TELEPHONE COMPANY.**

*See CORPORATION.*

**TENDER.**

Specific performance — when plaintiff not bound to accept offer to return consideration.

*Urbansky v. Shirmer*, 50.

**TESTAMENTARY CAPACITY.**

*See WILL.*

**TESTAMENTARY TRUST.**

*See TRUST.*

**TIMBER.**

*See REAL PROPERTY.*

**TORT.**

Former judgment for tort unsatisfied does not bar subsequent action against joint tortfeasor — subsequent action barred only when prior judgment satisfied — reply not necessary to defense of former recovery.

*Reno v. Thompson*, 816.

**TOWN.**

Highways in.

*See HIGHWAY.*

**TRANSFER TAX.**

*See TAX.*

**TRESPASS.**

*Injury to property by water from sewer — rule of liability of municipality stated — negligence must be shown.* In an action to recover damages for injury to property caused by water backing up through drains from a sewer during an unusual rainfall,

*Held*, that different conditions require the application of different principles in so-called sewer cases;

That the following rules as to municipal liability are established :

The duty of providing sewerage and drainage is *quasi-judicial*, and in determining the necessity, location, capacity, etc., the officers upon whom the duty is imposed are required to exercise judgment and discretion, and no action lies at the instance of an individual for damages based upon either a failure to act or an error of judgment in acting; this principle, however, cannot be extended so as to grant immunity to municipalities for acts which result in the invasion of private property or the creation of public or private nuisances, and for a trespass or a nuisance committed by it such municipality must respond the same as any individual.

*Held*, further, that in such action the plaintiff cannot recover without some proof to sustain a finding of negligence on the part of the defendant, and the fact that traps might have been used which would have prevented the backing up of water under such unusual circumstances, did not show the negligence of the defendant, but, if anything, showed the negligence of the plaintiff. *Ebbets v. City of New York*, 364.

By cutting timber — reservation of right to cut timber construed — when no time set timber must be removed within reasonable time — when such right not acquired by prescription.

*Dicker v. Hunt*, 821.

Former judgment for tort unsatisfied does not bar subsequent action against joint tortfeasor — subsequent action barred only when prior judgment satisfied — reply not necessary to defense of former recovery.

*Reno v. Thompson*, 316.

**TRIAL.**

1. *Mistrial* — *verdict received in absence of presiding justice.* When after the submission of a case to a jury the trial justice leaves the bench and the verdict is received by another justice of the same court, it is at most an irregularity which may be waived by the parties. *Terriberry v. Mathot*, 235.

2. *When irregularity waived.* When no objection is made to the reception of such verdict, but on the contrary the counsel for the defeated party makes various motions which stand over for the consideration of the justice who presided, the irregularity is waived. *Id.*

Crime — payment for goods with worthless check — evidence insufficient to sustain conviction for violation of section 529 of the Penal Code — erroneous refusal to charge — jurisdiction, question cannot be raised on conflicting evidence.

*People v. Lipp*, 504.

Crime — uttering forged note — knowledge of defendant — evidence — error in excluding communications made to defendant as to general character of note — when error to admit evidence of other unrelated forgeries.

*People v. Dolan*, 600.

Former judgment for tort unsatisfied does not bar subsequent action against joint tortfeasor — subsequent action barred only when prior judgment satisfied — reply not necessary to defense of former recovery.

*Reno v. Thompson*, 316.

Common carrier — no recovery on common-law liability of carrier under complaint setting out breach of express contract — recovery for tort not proper under complaint on contract — failure to show conversion.

*Rosenfeld v. Central Vermont R. Co.*, 871.

Evidence — when written statement of defendant's witness inadmissible — counsel not entitled to read such statement to witness — power of trial judge — negligence — injury while alighting from train.

*Finan v. New York Central & Hudson River R. R. Co.*, 383.

**TRIAL** — *Continued.*

Conversion — when complaint states cause of action for conversion — when question as to whether moneys were turned over for investment or as loan is for the jury — when written evidence not conclusive.

*Sinclair v. Higgins*, 206.

Libel — false publication calling plaintiff "a rogues' gallery man" — legal and express malice distinguished — proof of express malice essential to recovery of exemplary damages — erroneous charge.

*Carpenter v. New York Evening Journal Publishing Co.*, 286.

Attorney and client — proof insufficient to show retainer by wife when brought in as party defendant in suit against husband — evidence — objection to narration by witness.

*Altkrug v. Horowitz*, 420.

Evidence — privilege of communications to physician not waived by taking deposition of such physician — privilege of physician can only be waived in open court or by stipulation.

*Clifford v. Denver & Rio Grande Railroad Co.*, 518.

Crime — larceny — admission of evidence of another and unconnected theft by defendant reversible error — confession of defendant to said unrelated theft not admissible against him.

*People v. Sekeson*, 490.

Negligence — complaint — when allegations of injury sufficient to allow proof of impaired eyesight and varicose veins — when objection to exclusion of evidence of injuries sufficient.

*Rudomin v. Interurban Street Railway Co.*, 548.

Bills and notes — evidence insufficient to show an indorsement to be without recourse — direction of verdict — effect of failure to claim but one question as proper for jury.

*Wood v. Rairden*, 308.

Carrier of goods — bill of lading constitutes contract — erroneous charge — evidence — statements of carrier's servant made after delivery of goods inadmissible.

*Hoffman v. Metropolitan Express Co.*, 407.

Parties defendant — under complaint against joint defendants judgment may be had against one only — Code of Civil Procedure, section 1205, construed.

*Lawton v. Partridge*, 8.

Time of trial — it is not necessary to postpone the action until the termination of an action to recover the stock from said trustee.

*Weber v. Wallerstein (No. 1)*, 693.

Sale — contract to deliver goods F. O. B. — failure to show delivery — question of admission of delivery in letter is for jury.

*Sackett & Wilhelms Lith. & Print. Co. v. Cummins*, 300.

Divorce — when correspondent appearing in action not entitled to retrial of issues — Code of Civil Procedure, section 1757, construed.

*Boller v. Boller*, 240.

Negligence — passenger thrown from surface car by sudden jolt and rendered unconscious — when negligence question for jury.

*Lomas v. New York City Railway Co.*, 332.

Evidence — uncorroborated evidence of plaintiff — when truth thereof question for jury although defendant gives no evidence.

*Mendoza v. Levy*, 449.

Assignment — parol assignment of written contract — when assignee can recover thereon — erroneous charge.

*St. Regis Paper Co. v. Page Lumber Co.*, 108.

Libel — article insinuating lewd motives to scientist — complaint based on such article, when not demurrable.

*MacDonald v. Sun Printing & Publishing Assn. (No. 3)*, 467.

Sale — when contract for sale of goods not entire — finding that there was no "delivery" construed.

*Williams v. Wilson & McNeal Co.*, 442.

**TRIAL** — *Continued.*

Conversion — measure of damage — when plaintiff not entitled to recover highest market value — erroneous charge.

*Corn Exchange Bank v. Peabody*, 553.

Negligence — death by explosion of dynamite — failure to show negligence of defendant — erroneous charge.

*Hall v. Cayuga Lake Cement Co.*, 801.

Preferred cause — when action by receiver of corporation entitled to preference.

*Schlesinger v. Gihooly*, 158.

Will — charge — when error to charge that jury may find testamentary incapacity.

*Niemann v. Cordtmeyer*, 826.

Negligence — verdict not excessive.

*McGahie v. Sproat*, 445.

See PRACTICE.

**TRUST.**

1. *Beneficiary entitled to "dividends, issues and profits" of stock in manufacturing corporation — what portion of increase in assets of corporation included under said terms.* A will, creating certain trusts in specific stock of a corporation manufacturing locomotives, directed the trustees to pay to the use of the beneficiaries "the dividends, issues and profits thereof" until the beneficiaries arrived at the age of thirty years, when the stock itself, with any accumulations or earnings thereon, was to be paid to the beneficiaries absolutely, or, if dead, to their issue, etc.

The corporation made large earnings and increased its assets, and finally sold its entire plant, equipment and materials and was dissolved. In determining what portion of the total assets of the corporation should be paid to the beneficiaries as "dividends, issues and profits," and what portion was to be treated as principal,

*Held*, that at the death of the testatrix the value of the plant, equipment and materials, good will, patents and patent rights, licenses, trade marks, privileges and franchises and necessary working capital were to be treated as principal, and that the balance of the assets, consisting of invested surplus and working cash capital, should be taken as "dividends, issues and profits;"

That a large increase in the value of the assets at the time of sale, made up of materials and "betterments," was to be treated as principal, being an increase in the value of the property itself, and should not be treated as a "profit" arising from or growing out of the stock held in trust;

That the words "dividends, issues and profits," used in the creation of the trust, must be construed as meaning "income or earnings," and that a large balance representing good will could not be taken as earnings or increase;

That the value of the material on hand and the "betterments" at the time of sale should be considered as part of the capital or principal rather than "income or earnings," so far as the trusts were concerned;

That the question as to whether a sinking fund should have been provided to make up the loss in value of bonds held by the corporation, owing to a fall in premium value thereof, was to be determined by the intention of the testatrix, to be gathered from the terms of the will and from the surrounding circumstances; and that in the case at issue no such sinking fund was required. *Matter of Stevens*, 773.

2. *Trust deed with remainders to heirs of beneficiary — when heirs to be ascertained at death of beneficiary — adoption — when adopted child is heir and takes trust estate to exclusion of brothers of beneficiary.* When a deed of trust provides that after the death of the beneficiary the corpus of the estate shall go "to her heirs at law," such heirs are to be ascertained, not at the date of the instrument, but at the death of *cestui que trust*. Although brothers of such *cestui que trust*, who was unmarried at the date of the instrument, may be her heirs at the time of her death, their rights are subject to be divested if at the death of said *cestui que trust* she leaves other heirs entitled to take in preference to said brothers under the Statute of Descent as existing at her death.

So, too, the rights of such brothers as remaindermen are subject to be divested if the *cestui que trust* leave her surviving a lawfully adopted child entitled to inherit by statute at the date of her decease.

**TRUST** — *Continued.*

The right of inheritance is wholly a creation of the statute, and the statutes giving the right of inheritance to an adopted child are in effect a part of the same statute under which said brothers claim.

Hence, although such deed of trust was executed in 1853, at a time when brothers of the *cestui que trust* were living and when no statute allowing adoption or providing for inheritance by an adopted child was extant, nevertheless a child adopted by the *cestui que trust*, who survives her, and who, under the Laws of 1873, chapter 830, and by virtue of subsequent statutes, is entitled to inherit from the foster parent, is heir to the exclusion of said brothers and is entitled to the trust estate. Legislation on adoption stated. *Gilliam v. Guaranty Trust Co.*, 656.

3. *Testamentary trust — life beneficiary of the income and dividends of specific stock placed in trust is entitled to receive dividends declared thereon.* When a testator puts certain specific railroad stock and bonds, together with all interest thereon theretofore accrued or thereafter accruing, and every and all dividends which may be declared on said stock subsequent to the testator's death, in trust for the benefit of his wife for life, with a direction to the trustees to receive the income and profits thereof and apply the same to the use of said wife, with power in the trustees to sell and dispose of any or all of said stock and to invest and reinvest the proceeds in such securities as to them may seem advisable, and to apply the income and profits arising therefrom as aforesaid with remainder at the death of the wife to the heirs of the testator, the wife is entitled to receive dividends declared on said stock during the period of the trust, and such dividends are not to be considered as part of the principal. *Robertson v. de Brulatour*, 882.

4. *Distinction in this respect between trust of specific stock and trust of a fund of money.* There is a settled distinction between a case where specific securities consisting of stock and bonds are bequeathed to a trustee with a direction to pay the income and profits of such specific securities to a life beneficiary, and a case where a sum of money is bequeathed to trustees with directions to invest the same and pay the income of the amount invested to a beneficiary. In the latter case the trustees are bound, whatever the form of the investment, to preserve intact the capital of the trust, but where specific securities are put in trust with a direction that the income and profits thereof be paid to a beneficiary for life, with a bequest over at the termination of the life estate, the income or profits received from such securities belong to the life beneficiary and not merely the income of a specific fund equal in value to the securities at the time of the testator's death. *Id.*

5. *Dividends are income or profits.* The profits or surplus which a corporation earns or realizes in the management of its business, and which is paid to stockholders by way of dividends, whether earned before or after the creation of the trust, is income or profits which go to the life beneficiary. *Id.*

6. *Subscription rights accruing on such stock go to increase corpus of the trust.* But under a bequest of the income of such specific stock the life beneficiary is not entitled to the proceeds of the sale of rights to subscribe to new capital stock issued by the corporation. Such right of subscription is not in the nature of a dividend or distribution of profits. It is a right which accrues to the owners of the stock as an incident to its ownership. Hence, such subscription rights go to increase the capital of the trust, and the proceeds of a sale of said rights is part of the capital of the trust. *Id.*

7. *Unnecessary to provide a sinking fund to provide against depreciation in value of specific securities.* When specific stock is put in trust as aforesaid, the trustees are not entitled to set aside a part of the income as a sinking fund to provide for any depreciation in the value of the securities. The beneficiary is entitled to all the income, even though the payment of all such income would reduce the selling value of the securities. *Id.*

8. *Trustees receiving such specific stock entitled to one-half commissions.* By virtue of the amendment to section 3320 of the Code of Civil Procedure, made by Laws of 1904, chapter 755, trustees to whom such specific securities are bequeathed in trust are entitled to one-half commissions, payable out of the corpus of the estate, for receiving the principal thereof. The words "All sums of principal," as used in said section as amended, apply as well to securities in bulk as to money received.

**TRUST — Continued.**

*It seems*, that though such trustees are empowered to sell such specific stock and reinvest the proceeds, this power would not entitle them to any additional compensation, the duty being incident to the proper performance of the duties of the trust. *Id.*

9. *When life beneficiary entitled to act as trustee — when life beneficiary acting as trustee entitled to commissions.* Although it is a general rule that a beneficiary of a trust cannot be at the same time a trustee, yet where duties devolve upon the trustee other than those relating merely to the performance of the trust for the benefit of the beneficiary, the beneficiary may act as trustee for others interested in the estate. Where there is an active duty imposed upon the trustee for the benefit of remaindermen, the life beneficiary can act as trustee, and under such circumstances the trustee is entitled to commissions, although a life beneficiary. *Id.*

10. *When beneficiaries consenting to unauthorized loan by trustee not personally liable to cobeneficiaries.* Mere knowledge and consent by a beneficiary to an unauthorized loan made by a trustee in the absence of fraud or collusion, or the receipt by the beneficiary of any of the money, is not sufficient to make such beneficiary liable to reimburse his cobeneficiaries for any loss that may occur.

Hence, beneficiaries of a trust estate who have indorsed notes given to secure the payment of an unauthorized loan, in the absence of fraud or collusion, or a receipt by the indorsers of portions of the money loaned, are not personally liable to their cobeneficiaries for such unauthorized loan except on their indorsement. *Blair v. Cargill*, 853.

11. *Waiver of objections to and ratification of such loan by cobeneficiaries.* Moreover, when, after such unauthorized loan, the other beneficiaries, with knowledge, have ratified the accounts of the trustee after his decease, they have waived any objection which they might have made that the loan was unauthorized by law.

So, too, said cobeneficiaries by failing to appear and object to the unauthorized loan after the service of due notice of an application to discharge the retiring trustee are deemed to have assented to said loan and to have waived its illegality or the insufficiency of the security. *Id.*

12. *Ratification.* Beneficiaries may authorize or ratify that which otherwise would be a breach of trust. *Id.*

13. *When foreign judgment that note has outlawed is binding here.* Under such circumstances, when the substituted trustee has brought action in another State to foreclose a mortgage given to secure the unauthorized loan, and it is there decreed that some of the notes on which the beneficiaries were indorsers have outlawed, the cobeneficiaries are bound by that determination. *Id.*

14. *Extra allowance denied to beneficiaries, but allowed to accounting trustee.* Beneficiaries who have litigated the above issues as between themselves, should not be allowed counsel fees or an extra allowance payable out of the estate, but such allowance to the accounting trustee is proper. *Id.*

15. *Testamentary trustee — when entitled to commissions.* A testamentary trustee is entitled to commissions when he has executed his trust, although he has for some years paid the income to the beneficiary without deducting his commissions, and has made no accounting during that period. Such failure to deduct his commissions is not a waiver of his right thereto. *Matter of Haskin*, 754.

Executors — when executor cannot avail himself of Statute of Limitations on an accounting.

*Matter of Ashheim*, 176.

Tax Law — inheritance tax on property of non-resident — when trust funds passing under power of appointment taxable — when legacy not taxable.

*Matter of Lord*, 152.

Gift — when gift of savings bank deposit is in trust to pay over to beneficiaries.

*Mann v. Shrive*, 452.

**UNDERTAKING.**

Other than on appeal.

*See* BOND.

**UNDUE INFLUENCE.***See* DURESS.*See* WILL.**UNITED STATES CONSTITUTION.***See* CONSTITUTIONAL LAW.[See table of the provisions of the Constitution cited, *ante*, in this volume.]**UTICA.***See* MUNICIPAL CORPORATION.**VENDOR AND PURCHASER.**

Will construed—devise of life interest with contingent remainders over—when life tenant cannot compel specific performance by vendee of contract of purchase.

*Webel v. Kelly*, 521.

Partnership to speculate in lands—injunction—when carrying out of contract of sale made by one partner will not be enjoined.

*Babcock v. Leonard*, 294.*See* DEED.*See* REAL PROPERTY.*See* SALE.*See* SPECIFIC PERFORMANCE.**VERDICT.**

In negligence cases.

*See* NEGLIGENCE.

Of a jury.

*See* TRIAL.**VERIFICATION.**

Of pleadings.

*See* PLEADING.**VETERAN.**

In reference to his right to public office.

*See* CIVIL SERVICE.**VILLAGE.***See* MUNICIPAL CORPORATION.**WAIVER.**

Trust—when beneficiaries consenting to unauthorized loan by trustee not personally liable to cobeneficiaries—waiver of objections to and ratification of such loan by cobeneficiaries—when foreign judgment that note has outlawed is binding here—extra allowance denied to beneficiaries, but allowed to accounting trustee.

*Blair v. Cargill*, 853.

Evidence—privilege of communications to physician not waived by taking deposition of such physician—privilege of physician can only be waived in open court or by stipulation.

*Clifford v. Denver & Rio Grande Railroad Co.*, 513.

Membership life insurance association—change of beneficiary under by-laws—failure of insured to give indemnity on changing beneficiary—indemnity waived by insurer.

*Stronge v. Supreme Lodge*, 87.

Suretyship—bond to secure proper performance of contract—when surety is bound by parol waivers of provisions of contract—estoppel of surety.

*Helman v. City Trust, Safe Deposit & Surety Co.*, 879.

Highway Law—highway commissioners may waive notice of application to lay out road—when public officers may waive statutory provisions.

*Matter of Wood*, 781.

Contempt proceedings—failure to pay alimony—waiver of right to the amount granted in judgment.

*Compton v. Compton*, 923.



**WAIVER — Continued.**

Mistrial — verdict received in absence of presiding justice — when irregularity waived.

*Terriberry v. Mathot*, 235.

Specific performance — when prior false representations of plaintiff waived by defendant.

*Urbansky v. Shirmer*, 50.

Testamentary trustee — when entitled to commissions.

*Mutter of Huskin*, 754.

**WARRANTY.**

Deed of.

See DEED.

**WATERCOURSE.**

1. *Duty to keep artificial ditch unobstructed.* A railroad company, which has built a ditch to collect waters coming upon its land from the premises of adjoining landowners and has built a culvert to conduct said waters under the railroad embankment, is bound to use reasonable and ordinary care to keep such ditch and culvert unobstructed, and is liable if accumulated waters set back upon adjacent lands causing damage. *Branson v. New York Central & H. R. R. Co.*, 737.

2. *Owner liable for want of reasonable care.* It makes no difference that the water is collected in an artificial channel or that the water came from the lands of persons other than the plaintiff. A landowner may not collect water into an artificial channel upon his lands and discharge it upon the lands of another in such volume or quantity in excess of the natural drainage as to cause injury. *Id.*

3. *Charge.* Charge as to liability of defendant approved. *Id.*

Erroneous finding as to height of crest of dam — height of dam to be taken from level of average flow of stream, not from the minimum level.

*Remington Pulp & Paper Co. v. Water Commissioners of City of Watertown*, 907.

**WILL.**

1. *Construed — devise of life interest with contingent remainders over — when life tenant cannot compel specific performance by vendee of contract of purchase.* When a will directs the executor to hold specific real estate in trust and invest the income until an adopted son attains the age of twenty-one years, said property not to be sold during the lifetime of said adopted son, but to be conveyed to said son when he arrives at the age of twenty-five years, "to be held by him as follows: In case of my said adopted son departing this life before me or \* \* \* after my death without leaving lawful issue, then I give all my property, real and personal, \* \* \* to my nephews \* \* \* and my niece \* \* \* and to their children," the remainder to the nephews in case of the death of the adopted son is made part of the trust, and said adopted son, though surviving the age of twenty-five years, and holding under a conveyance from the executor, is only a life tenant and the estate is charged with a contingent remainder to his issue, if any, and if not, then with remainders to said nephews and niece or their children.

Hence, said adopted son cannot specifically enforce the contract of a third person to purchase said lands.

HOUGHTON and McLAUGHLIN, J.J. (concurring in result only): The will should be construed to give the plaintiff absolute title, but as there are doubts as to this, the vendee should not be required to perform specifically. *Webel v. Kelly*, 521.

2. *Residuary clause construed — when next of kin of deceased residuary legatee not entitled to share in residuary estate.* When a will and codicil, after making specific bequests, gives, devises and bequeaths the whole residuary estate to the testator's wife and to specifically named sisters, nephews and nieces, share and share alike, "and in case of the death of either my beloved wife, my sisters, my nieces or nephews before the whole of my estate shall be divided, then I direct the said residuary to be divided among the survivors only share and share alike," the general gift contained in the first part of said residuary clause is limited by the restriction contained in the latter portion. Hence, the next of kin of a residuary legatee who has died before the division of the residuary estate are not entitled to take, but the whole must be divided among the survivors of the residuary legatees named. *Matter of Wiley*, 590.

**WILL—Continued.**

3. *Absolute gift cut down by subsequent limitation.* A gift absolute in form may be cut down by a subsequent limitation disposing of the same property in a different manner upon the happening of a contingency. *Id.*

4. *Equitable conversion.* As said will in other clauses effected an equitable conversion of the realty into money, and by the carrying out of specific trusts postponed the division of the residuary estate, the whole instrument taken together shows an intention on the part of the testator to leave the residuary estate to the survivors of the legatees named. *Id.*

5. *Charge—when error to charge that jury may find testamentary incapacity.* In an action to set aside a will on the ground of testamentary incapacity and undue influence, it is error to charge that "There is in this case enough to warrant you in finding that this will was the product of undue influence, or in finding that he was incompetent to make a will. It is competent for you to find that, and it is for you to find one way or the other. The court cannot aid you much in reaching a conclusion, but there is no legal obstacle in the way of your finding that this will is void because the man was incompetent to make the will, or because it was the product of undue influence."

Such charge is tantamount to a direction to find testamentary incapacity or undue influence, and usurps the functions of the jury. *Niemann v. Cordtmeyer*, 326.

6. *Discretionary power of disposal by widow—when widow may exercise such power by a devise charged with advancements to other heirs.* When a will gives to the testator's widow a life estate in certain real property with power "to devise the same by her last will and testament \* \* \* to any or all of our children or grandchildren or both in such shares or proportions as to her shall seem best," and in the event of a failure to exercise such power of disposal by the widow the will gives said property in remainder "to my children," etc., the widow has power to devise a portion of said real estate to a granddaughter of the testator charged with deductions equal to the amounts the testatrix has advanced to the father and brother of said granddaughter then living. *Monjo v. Woodhouse*, 80.

7. *Devisees estopped.* As the testatrix, under her husband's will, had power to cut off such granddaughter entirely, she cannot complain because the devise is charged with said deductions.

Nor can she contend that there was a failure by the widow properly to exercise the power of disposal, for in that event the share of the lands would go to the father of said granddaughter then living. *Id.*

8. *Conveyance by warranty deed for full value shows intention to exercise power.* When the devisee of a life interest, who was also named executrix with full power to sell real estate, sells lands for full value and gives a warranty deed, the transaction itself shows an intention to exercise the power to convey the fee and not the life estate only.

Hence, the rights of a remainderman as against the grantee are cut off. *Vines v. Clarke*, 12.

9. *Power coupled with interest.* When the donee of a power to sell has also an interest in the subject of the power and makes a conveyance without reference to the power, it is a question of intention as to whether the conveyance was in pursuance of the power or only a grant of the interest. *Id.*

10. *Husband not necessary party to wife's deed.* It is not necessary for the husband of a donee of such power coupled with an interest to join in the wife's conveyance. *Id.*

Trust—beneficiary entitled to "dividends, issues and profits" of stock in manufacturing corporation—what portion of increase in assets of corporation included under said terms.

*Matter of Stevens*, 773.

Partition—when direction for sale of premises proper although there are contingent interests.

*Dwight v. Lawrence*, 616.

See TRUST.

**WRIT.**

Of certiorari.

See CERTIORARI.

Of mandamus.

See MANDAMUS.

1028. 418. 2 m 9

12/1/06.



